TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 339

THE BALTIMORE AND OHIO RAILROAD COMPANY

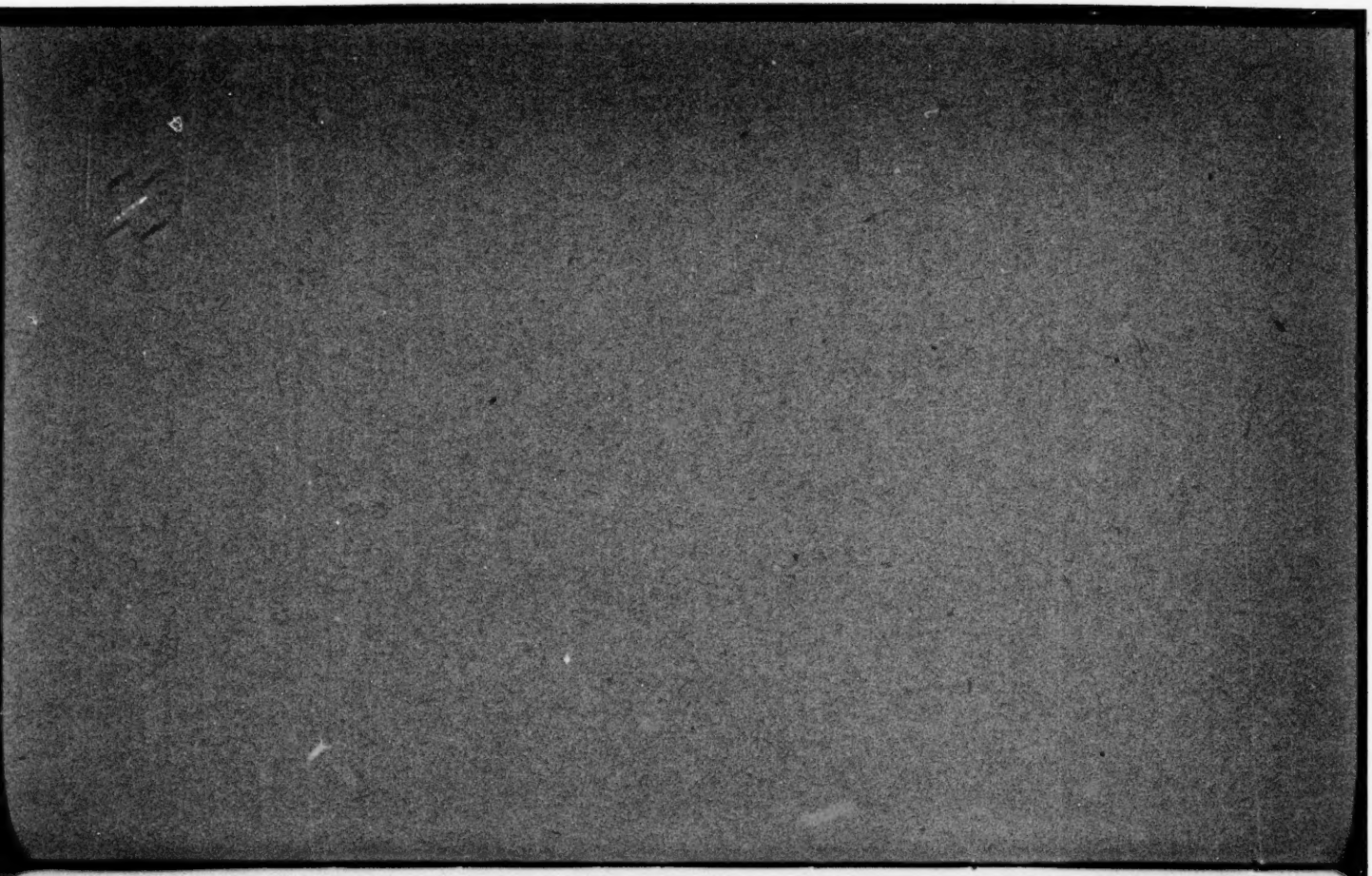
vs.

THE INTERSTATE COMMERCE COMMISSION.

ON A CERTIFICATE FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

FILED JANUARY 25, 1906.

(21,491.)



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OCTOBER TERM, 1908.

No. 695.

THE BALTIMORE AND OHIO RAILROAD COMPANY

vs.

THE INTERSTATE COMMERCE COMMISSION.

ON A CERTIFICATE FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

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a THE UNITED STATES OF AMERICA,
District of Maryland, To wit:

At a Circuit Court of the United States for the District of Maryland, begun and held at the Court-House, in the City of Baltimore, on the first Monday in November (being the second day of the same month), in the year of our Lord one thousand nine hundred and eight—present, Hon. Nathan Goff, United States Circuit Judge; Hon. Jeter C. Pritchard, United States Circuit Judge; Hon. Thomas J. Morris, Judge of the Maryland District; John C. Rose, Esq., Attorney; John F. Langhammer, Esq., Marshal; Arthur L. Spamer, Clerk—among other were the following proceedings, to wit:

In Equity.

THE BALTIMORE AND OHIO RAILROAD COMPANY, Complainant,
versus
THE INTERSTATE COMMERCE COMMISSION, Defendant.

1 *Bill of Complaint.*

Filed July 20th, 1908.

In the Circuit Court of the United States for the District of Maryland. In Equity.

THE BALTIMORE AND OHIO RAILROAD COMPANY, Complainant,
vs.
THE INTERSTATE COMMERCE COMMISSION, Defendant.

To the Honorable, the Judges of the Circuit Court of the United States within and for the District of Maryland:

Your orator, The Baltimore and Ohio Railroad Company, respectfully shows as follows:

I. The Baltimore and Ohio Railroad Company is a corporation duly incorporated by the General Assembly of Maryland by Chapter 123 of the Acts of 1826; and is a common carrier engaged in the transportation of property by railroad between points in Maryland and points in other States and in the District of Columbia, and has its principal operating office in the City of Baltimore and District of Maryland. The defendant, the Interstate Commerce Commission, has been created and exists, and at all times mentioned in this complaint has existed under and by virtue of an Act of the Congress of the United States entitled "An Act to Regulate Commerce," approved February 4th, 1887, and acts amendatory thereof and supplemental thereto.

2 The matter in dispute in this cause exceeds, exclusive of interest and costs, the sum or value of two thousand dollars.

II. On the 24th day of June, 1908, there was served upon your orator, in accordance with the provisions of said Act to Regulate Commerce and amendments and supplements thereto, an order of the Interstate Commerce Commission entered June 2nd, 1908, in the case entitled "Rail and River Coal Company *vs.* The Baltimore and Ohio Railroad Company, No. 1322," accompanying which order was a report from the Commission bearing the same date. Your orator files herewith a certified copy of said order and of said report, marked "Complainant's Exhibit, No. 1," and prays that it be taken as part of this bill of complaint. As fully appears in and by said order of the Commission and report accompanying the same, the Commission thereby assumes authority under Section 15 of the Interstate Commerce Act as amended June 29th, 1906, to enter said order as one relating to or prescribing regulations or practices affecting the rates or charges demanded, charged or collected by your orator for the transportation of property, as defined in the first section of said Interstate Commerce Act as so amended, and the said Commission does in and by said order require your orator on or before the first day of August, 1908, to cease and desist, and, during the period of at least two years thereafter, to abstain from maintaining and enforcing with respect to interstate shipments of coal the present practice or regulation of failing or refusing in times of coal car shortage to count railway fuel cars and leased or so-called private coal cars against the distributive shares of available system coal cars, to which the coal operators to whom said leased or so-called private coal cars belong or said foreign railway fuel cars are consigned are entitled according to the ratings of their respective mines, and does require your orator to establish on or before the first day of August, 1908, and during a period of at least two years thereafter to maintain and enforce with respect to interstate shipments of coal and the distribution of cars therefor a practice or regulation specified and prescribed in said order.

3 III. The system of railroads operated by your orator extends from Philadelphia, in the State of Pennsylvania, through that State and the States of Delaware, Maryland, West Virginia, Ohio, Indiana, and Illinois to the City of Chicago in the last named State, and through the States of Pennsylvania and Ohio to Cleveland, Lorain and Fairport on Lake Erie, and also comprises numerous branch lines and intersecting lines of railroad lying in the several States named and in the District of Columbia, the whole comprising a mileage of approximately 3250 miles of railroad. In the practical operation of said system of railroads your orator must and does divide the same into operating divisions, of which there are twelve, namely, the Philadelphia, Baltimore, Cumberland, Monongah, Wheeling, Ohio River, Cleveland, Newark, Connellsville, Pittsburg, New Castle and Chicago divisions; and with respect to interstate shipments of coal your orator must and does make distribution daily of cars therefor to the mines located on said respective operating divisions, such distribution or apportionment of cars being made between the mines on each respective operating division exclusively. The bituminous coal mines served by the system of rail-

roads operated by your orator as aforesaid are situated in the States of Maryland, West Virginia, Pennsylvania and Ohio, and number approximately 340 separate and distinct mines, producing respectively coals of several diverse characters and uses, and shipping the same to several diverse markets. The mines in Maryland are located on the Cumberland Division; the greater part of the mines in West Virginia are located on the Monongah Division; the mines in Pennsylvania are located on the Connellsville and Pittsburg Divisions; the mines in Ohio are located on the Wheeling, Cleveland and Newark Divisions; and the mining operations of the Rail and River Coal Company, the complainant in the said case before the Interstate Commerce Commission, are located on the Newark Division, producing a fuel coal shipped entirely to western markets, and which has never been and cannot be marketed in the East.

4 IV. Your orator owns and controls, and has at all times herein mentioned owned and controlled, system coal cars sufficient in number and capacity to enable it fully to perform its duty as a common carrier in respect to the receipt and transportation of coal from all said mines. Said system coal cars number approximately forty-five thousand, and have an aggregate tonnage capacity of more than one million eight hundred thousand tons. Such coal car equipment during a considerable portion of each year is much larger than is required for the receipt and transportation of all coal tendered to your orator for carriage by mine operators, and during the greater part of each year is sufficient to enable your orator to receive and transport all coal so tendered to it. It would be sufficient at all times were it not for circumstances beyond your orator's control, which at times, and particularly during the winter months, prevent your orator from supplying mine operators with sufficient cars for the receipt and transportation of all such coal. Principal among such circumstances are the detention on foreign railroads of cars of your orator which have been consigned to points on such foreign railroads, and the very great fluctuations in the amount of coal tendered to your orator for carriage by the mines aforesaid. In order to provide for the equitable division of its system coal cars among mine operators at the times of car shortage above referred to, your orator has devised and put into effect on its system of railroads a uniform method of coal car distribution, whereby your orator's system coal car equipment available on each operating division is divided among the mines in proportion to the tonnage rating of such mines, which rating is in each case ascertained by a careful investigation of the actual capacity of the mine to produce and ship coal. Your orator has at all the times mentioned in this complaint kept its railroads equipped with motive power, employés, tracks, terminals, sidings and all other facilities amply adequate to enable it at all times promptly to transport all the coal cars hereinbefore or hereinafter mentioned, and the car shortages hereinbefore referred

5 to have not in any degree been caused or increased by any deficiency in or lack of motive power, employés, tracks, terminals, sidings, or other facilities.

V. Beginning in the year 1852 your orator established on its

line in respect of the coal trade a service of transportation in the cars of others in addition to the service of transportation in its own cars. At the same time your orator adopted the rule that as to each class of service all shippers should be placed on a footing of equality, thereby permitting all shippers alike to avail themselves of either of such classes of service on the same terms. In establishing on such terms these two classes of transportation your orator followed the practice of English railroads and of several railroads in the United States pursuant to the requirements of their charter acts. The two classes of transportation thus established have ever since been continuously maintained by your orator in the same manner and in accordance with the rule of equality hereinbefore stated. Throughout this time the motive power, employes, tracks, terminals, sidings and all other facilities of your orator have at all times been provided with a view to the movement not only of the system cars which it owns and controls but also of the cars supplied by shippers, and have for many years been and are now amply sufficient for the prompt movement of all cars of both classes. Your orator has during all this time applied such motive power, employes, tracks, terminals, sidings and all other facilities to the use of both these classes of transportation without giving any preference to one as against the other. These two classes of transportation as maintained by your orator being thus separate and distinct, your orator could not justly and legally diminish, and therefore does not diminish the share of its system cars to which a mine is equitably entitled at times of car shortage because of the fact that the operator of such mine has provided other cars for the transportation of coal from that mine. In this respect the practice of your orator has been uniform ever since it established the second class of transportation in cars of others in 1852. Since that period the cars

6 supplied by shippers for the carriage of their coal have increased in numbers from time to time as shippers have availed themselves of the class of transportation then established by our orator. Shippers of commodities other than coal have also availed themselves of this class of transportation. There are now in use on your orator's system of railroads approximately fifteen hundred private coal cars owned by seven mine operators.

The carriage of merchandise and commodities in the car of the shipper or consignee is, under the English Act of 1854 (36 and 37 Vict. c. 48), defined as a class or description of "traffic." Under the acts in this country, state and federal, it is generally defined as a class or description of "transportation;" but in both countries alike it is by statute and in practice a service distinct from the service rendered by the railroad carrier in the cars of the carrier.. This branch of the railroad service did not originate with the carrier, but originated in the requirements of the law and the demands of the producers, shippers and consumers of merchandise.

In this country, while this branch of the transportation service has been protected against encroachments of the carrier by such acts as that 1849, in Pennsylvania (Act of February 19, 1849, P. L. 79, § 18), and of 1878, in Maryland (Maryland laws of 1878, Chapter

155, § 5, approved March 27, 1878), the force operating generally to compel the carrier to continue this class of transportation service side by side with the transportation service in its own cars has been the commercial force brought to bear by the producers, shippers and consumers of particular articles of merchandise which could be more economically handled by means of the transportation service in individual cars. The peculiar function of the railroad car in the bituminous coal trade is that it affords the most economical storage of the commodity between the miner and the consumer. The difficulty and great cost of storing bituminous coal, either at the mines or at points of consumption, have confined such storage in quantity to points reached by water. Wherever the railroad car can
7 find access practically the only storage is in cars, because that method of doing business is the most economical method.

The unavoidable irregularities in the supply of cars, which the railroad carrier is able to furnish or can be compelled to furnish in the discharge of its common law or statutory obligations in that regard, have been considered by many producers and consumers, both in the past and in the present, as necessitating the acquisition by them of individual cars, in order to avail themselves of the transportation service in those cars, even though, as is the fact, such service is much more expensive to the owners of such cars than is the service rendered by the railroad in its own cars. The use of the car as the economical method of storing coal between the producer and consumer, has kept in existence in the coal trade the demand for the transportation service in individual cars, while in the course of railroad development that demand has ceased in many other lines of trade, because of the additional expense entailed upon the trader.

VI. In the coal trade there are now used in this service of transportation not only cars owned by the miners and shippers of coal, herein and in the order of the Commission referred to as "private coal cars," but also cars furnished to such shippers by consignees,—this latter class comprising cars supplied by manufacturing and industrial corporations and also cars supplied by foreign railroads for the carriage of coal which such railroads purchase as fuel from the mine operators served by your orator.

Under your orator's present regulations and practice it is open to all mines alike to sell coal to any railroad that will buy it. Such coal is usually sold f. o. b. cars at the mine. The foreign railroad having its own cars in which to transport the coal bought for its own use, sends its own cars for that special purpose under such instructions that they cannot be used for any other. They are
8 not distributed upon any system whatever, but are sent directly to the mine to be loaded with the coal that the foreign railroad has purchased from it.

The same conditions apply also to the transportation of coal purchased at the mines by a consumer who has individual cars of his own to send for the coal. It is open to all mines alike to sell coal to such a consumer and thereby obtain the opportunity to load it into the consumer's cars. The use of these consumers' cars, as in

the case of the mine operators' own cars, results in an increased transportation expense to the owner of the cars, but the advantages of regularity and control are found by the owners who have successfully used them to offset in their business transactions the increased expense. The foreign railroad must insure itself a steady supply of fuel coal, and the furnace or steel works must have a continuous supply of coal of peculiar quality.

VII. The mining operations of the Rail and River Coal Company, complainant in the said case before the Commission, are located on the operating division known as the Newark Division of your orator's system of railroads. In the answer filed by your orator in said case before the Commission it was alleged, was proved by the uncontradicted testimony adduced before the Commission, and was not found to the contrary by the Commission, that on the said Newark Division no operator or mine owned or used private coal cars, that the supply of cars to the mining operations of the Rail and River Coal Company was in no way affected in times of car scarcity by the regulations or practice of your orator in respect to said private coal cars, such regulations or practice having no application and nothing to apply to on the Newark Division. No other operator on the Newark Division or elsewhere was a party to the said case before the Interstate Commerce Commission.

VIII. On January 16th, 1907, on relation of the Pitcairn Coal Company, proceedings in mandamus were instituted in
9 this Honorable Court under Section 23 of the said Interstate Commerce Act, entitled "United States *ex rel.* Pitcairn Coal Company *vs.* The Baltimore and Ohio Railroad Company, *et al.*," to which proceedings not only your orator but all the coal operators on the Monongah Division of your orator's system of railroads were made or became parties, several of the said parties owning such private coal cars and using the same on your orator's railroad, and several using foreign railway fuel cars and consumers' cars. The petition of said relator in said mandamus proceedings included and covered every ground of complaint, issue or question with respect to your orator's present regulations or practice in the distribution of coal cars in the transportation of interstate shipments of coal in times of coal car shortage that were made or raised by the petition of the Rail and River Coal Company in said case before the Interstate Commerce Commission filed November 8th, 1907, or which are covered or decided by the said order of the Interstate Commerce Commission or the said report of the Commission. In the said cause in this Honorable Court such proceedings were had that, after answer not only by your orator but by the respective coal operators interested as owners and users of individual or private cars and as users of foreign railway fuel cars and consumers' cars, and after testimony taken and full hearing accorded to all parties, this Honorable Court on the 8th day of July, 1907, entered its judgment and decree for the issuance of a peremptory writ of mandamus in accordance with the opinion of the Court filed June 11th, 1907. On July 19th, 1907, on petition of your orator and of several of the coal mining companies parties, writ of error and supersedeas

were allowed, a bond in the sum of $300,000.00 being required and given. Thereupon the said cause was on writ of error taken to the Circuit Court of Appeals of the United States for the Fourth Circuit, was argued on appeal in said court on the 17th and 18th of February, 1908, and is still in said court pending and still undecided. In and by the judgment of this Honorable Court in
10 said cause the prayer of the petition of the relator, the Pitcairn Coal Company, in respect to the regulations and practice of your orator as to said private coal cars belonging to coal operators was allowed, but the prayer of the relator's petition with respect to the regulations and practice of your orator concerning foreign railway fuel cars and consumers' cars was denied, and from so much of the judgment as denied the said prayer of the relator, it, the relator, sued out a writ of error, which cross-appeal was argued in the Circuit Court of Appeals at the same time with the appeal of your orator aforesaid. Your orator is informed and believes, and so states, that relying on the judgment and decree of this Honorable Court the coal operators on the Monongah Division of your orator's system of railroads, parties to the said mandamus cause in this court, have entered into contracts with foreign railroad companies for the sale to such railroad companies of their fuel coal for the current coal year, extending from April 1st, 1908, to April 1st, 1909, such contracts contemplating and providing as one of the considerations for the same that the cars of such foreign railroads be supplied and furnished for the loading of the fuel coal so contracted to be sold in accordance with the present regulations and practice of your orator with respect to such fuel cars on its line of railroad, and that similar contracts have been entered into by said operators, parties to said mandamus cause in this court, for the sale and delivery on cars of consumers of coal purchased by such consumers for which they supply their own cars and receive the same in accordance with the present regulations and practice of your orator in respect to such consumers' cars.

IX. Notwithstanding the Interstate Commerce Commission was fully informed, by the answer of your orator in the said case before the Commission, and by the production to the Commission of the record in the Circuit Court of Appeals, of the pendency of said mandamus cause in said court and the judgment and decree of this Honorable Court therein, the Commission has nevertheless
11 made and directed to your orator the said order, wherein and whereby it seeks to require your orator to change and reverse its present regulation and practice, as well on the Monongah Division and all other divisions of its railroad system as on the Newark Division, not only with respect to the counting of individual or private cars in times of car scarcity, but with respect to the counting of foreign railway fuel cars and consumers' cars at such times; and your orator shows that compliance with such order would not only deprive it and the appellant coal companies, defendants below in the said mandamus cause, of the benefit of their appeal and supersedeas pending the final decision of said cause on appeal, but will require this defendant to deprive the coal operators, defendants in said

mandamus cause, of the benefit of the judgment and decree in their favor as to foreign railway fuel cars and consumers' cars entered in said cause by this Honorable Court.

X. Your orator is advised, and so states, that the said order of the Interstate Commerce Commission is unlawful, null and void for the following and among other reasons, and in the following and among other particulars, to wit:

First. In that said Commission has assumed and does assume to make and enforce said order on authority of Section 15 of the Act to Regulate Commerce as amended by the Act passed June 29th, 1906, commonly known as the Hepburn Act, as one contemplated and authorized by said Section 15, and assumes and seeks to subject your orator to the penalties provided by Section 16 of said act as so amended for failure to obey an order lawfully made under said Section 15, whereas in fact and in law said order of the Commission is not an order contemplated or authorized by said Section 15 or lawfully issuable thereunder by the said Commission.

Second. In that as to so much of said order as relates to or affects the counting or not counting by your orator of so-called private coal cars belonging to individual operators, the Commission made
12 and issued said decision and order without consideration of the facts legally and properly proved in evidence in the said case before the Commission, and did make and issue said decision and order upon and by reason of an erroneous assumption of law and upon facts alleged to have been found by the Commission from the evidence adduced before it in other proceedings before the Commission, to none of which proceedings your orator was a party. Referring to said private cars and also foreign railway fuel cars the said report of the Commission says:

"Under the defendant's rules these cars are delivered to the operator to whom they are consigned or manifested, without being charged against his percentage in the general distribution. And these practices the complainants insist are discriminatory in their results and therefore unlawful. These questions have been presented and elaborately argued before the Commission in other proceedings, and have had exhaustive and careful consideration. They will not, therefore, be further considered in connection with this complaint. It will suffice to say, in accordance with the announcement made in *Railroad Commission of Ohio, v. Hocking Valley Ry. Co.,* 12 I. C. C. Rep., 398, that the view of the Commission is that the practice of the defendant in not charging private or individual cars against the percentages of the operators receiving them is unlawful and that such operators are not entitled in the general distribution of available cars to receive their respective proportions of the system cars in addition to their private cars. A like ruling must be made with respect to foreign railway fuel cars."

Third. In that as to so much of said order as relates to or affects the counting or not counting by your orator of foreign railway fuel cars consigned to individual operators, the Commission made and issued said decision and order without consideration of the facts legally and properly proved in evidence in the said case before the

Commission, and did make and issue said decision and order upon and by reason of an erroneous assumption of law and upon facts alleged to have been found by the Commission from the evidence adduced before it in other proceedings before the Commission, to none of which proceedings your orator was a party.

13 *Fourth.* In that the said Commission erred in holding or deciding that your orator was or is in and by its present regulations or practices mentioned in said order doing anything unlawful, and in ordering and requiring your orator to abstain from maintaining and enforcing with respect to interstate shipments of coal its present practice or regulation referred to in said order.

Fifth. In that the said Commission erred in requiring in and by the said order that your orator established with respect to interstate shipments of coal a practice or regulation specified in said order. By establishing, maintaining and enforcing such a practice or regulation as that so specified your orator would in fact violate the provisions of the third section of the Act to Regulate Commerce by making, creating and giving undue and unreasonable preference and advantages, and undue and unreasonable prejudices and disadvantages as between shippers of coal in interstate commerce over its lines of railroad contrary to the provisions of such section.

XI. Your orator further shows that Section 16 of said Act to Regulate Commerce as amended contains the following provision:

"Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of section fifteen of this Act, shall forfeit to the United States the sum of five thousand dollars for each offense. Every distinct violation shall be a separate offense, and in case of a continuing violation each day shall be deemed a separate offense.

The forfeiture provided for in this Act shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States brought in the district where the carrier has its principal operating office, or in any district through which the road of the carrier runs."

The said unlawful order of the Commission, made and promulgated by it as aforesaid in assumed exercise of an authority

14 unlawfully claimed by the Commission under Section 15 of said Act, will, unless the same be enjoined, set aside, annulled or suspended by this Honorable Court, subject your orator to a multiplicity of suits for heavy penalties under the above quoted provisions of said Section 16 of said Act. Compliance by your orator with the requirements of said unlawful order even temporarily pending final adju-cation herein of the lawfulness of the same, will not only, as already hereinbefore stated, deprive your orator and the coal operators, defendants in the mandamus proceedings in this court hereinbefore referred to, of the benefit of their respective appeals and supersedeas and of the judgment of this Court in their favor, but will upon the final judgment of this

court in said cause that said order is unlawful, null and void, or at any time before such final judgment, render your orator liable to actions for damages by any and all coal operators on its lines of railroad who own private coal cars or who have made contracts with foreign railroad companies or other consumers for the loading of consumers' cars, and not only will your orator be subjected to a multiplicity of suits on this account, but your orator will be without any means of reparation for the losses sustained by it thereby.

Wherefore

Your orator prays that a preliminary or interlocutory order of injunction may be entered suspending the order of the said Interstate Commerce Commission and restraining the said Interstate Commerce Commission from taking any steps or instituting any proceedings to enforce said order, until the final determination of this cause, and that upon a final hearing of this cause a decree be entered herein enjoining, setting aside, annulling and suspending the said order of the Interstate Commerce Commission and perpetually enjoining the enforcement of said order.

15 Your orator further prays that, if any delay shall intervene between the filing of this bill and the issuance of a preliminary or interlocutory order of injunction as prayed for herein, an order be issued herein suspending the order of the Interstate Commerce Commission and enjoining the enforcement thereof until the hearing and final determination of the application for the preliminary or interlocutory order prayed for herein.

Your orator further prays that such other and further relief be granted in the premises as justice and equity may require.

Your orator further prays that your Honors may grant unto your orator a writ of subpœna of the United States of America directed to the Interstate Commerce Commission, commanding it at a certain day and under a certain penalty therein to be specified personally to be and appear before your Honors in this Honorable Court and then and there full, true and complete answer make to all and singular the premises, but not under oath (an answer under oath being hereby expressly waived), and to stand to and abide such order and decree herein as to your Honors shall seem meet and agreeable to equity and good conscience.

And your orator will ever pray, &c.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
By HUGH L. BOND, JR., *Second Vice-President.*

W. A. PARKER,
W. IRVINE CROSS,
Solicitors for Complainant.

16 STATE OF MARYLAND,
City of Baltimore, To wit:

This day personally appeared before me, the undersigned, Hugh L. Bond, Jr., who, being by me first duly sworn, deposes and says

that he is the Second Vice-President of The Baltimore and Ohio Railroad Company, the complainant named in the above written complaint; that he has read the said complaint; and that the same is true of his own knowledge, except such matters as are therein stated on information and belief, and that as to such statements he believes it to be true.

HUGH L. BOND, JR.

Subscribed and sworn to before me, this 18th day of July, 1908.

WILLIAM J. ROTH,
Notary Public.

[NOTARIAL SEAL.]

17 & 18 "COMPLAINANT'S EXHIBIT No. 1."

Filed with the Bill of Complaint.

Before the Interstate Commerce Commission.

No. 1322.

RAIL & RIVER COAL COMPANY
v.
BALTIMORE & OHIO RAILROAD COMPANY.

Submitted April 11, 1908; Decided June 2, 1908.

H. B. Arnold, for complainant.
Hugh L. Bond, Jr., John G. Wilson, W. A. Parker, and *F. A. Durban* for defendant.

Report and Order of the Commission.

19 Certified Copy.

No. 1322.

RAIL & RIVER COAL COMPANY
v.
BALTIMORE & OHIO RAILROAD COMPANY.

Submitted April 11, 1908; Decided June 2, 1908.

1. The Commission has jurisdiction of complaints involving the practices and regulations of interstate carriers in respect to the distribution of coal cars. Section 15 of the act is to be read in the widest possible sense; it brings within the jurisdiction of the Commission all the regulations and practices of carriers under which they offer their services to the shipping public, and conduct their transportation.
2. Any regulation or practice that withdraws from a shipper the equal opportunity of taking advantage of the rates offered by a carrier is a regulation or practice "affecting rates," within the meaning of that phrase as used in section 15.

3. The principles announced in *Railroad Commission of Ohio v. Hocking Valley Ry. Co.*, 12 I. C. C. Rep., 398, in regard to the distribution of private coal cars and foreign railway fuel cars, adhered to and reaffirmed with a reference to the obvious relation between a shortage in cars and an insufficiency of motive power, sidings, train crews, and other facilities which usually accompany a car shortage.
4. As a mere matter of law and in the absence of a definite showing based on actual experience a system of rating mines that takes into consideration both physical and commercial capacity can not be said to be discriminatory and unlawful. A rule permitting the owner of several mines to "pool" or group all his percentage cars at one of them can not be condemned as unlawful merely on hypothetical grounds unsupported by proof of discriminatory results.

H. B. Arnold, for complainant.
Hugh L. Bond, jr., John G. Wilson, W. A. Parker, and F. A. Durban, for defendant.

Report of the Commission.

HARLAN, *Commissioner:*

A preliminary question of jurisdiction must first be disposed of before the other questions of fact and law presented by this record may properly be considered. The complainant alleges that the operation of the defendant's rules and regulations governing the distribution of coal cars among the various coal mining dis-
20 tricts on its lines results in giving to some of the districts a less than a just proportion of available cars; and that, as applied to the distribution of cars allotted to the particular district in which the complainant is mining coal, the rules and regulations give an undue preference to some of the operators in that district and create an unlawful discrimination against others. The complainant therefore prays that these regulations and practices may be declared to be unlawful and that the defendant may be required by appropriate order to adopt a plan that will yield more equitable results. In its answer the defendant, while denying any inequality and unfairness in the distribution, raises the jurisdictional question by pleading that such matters are not within the scope of the regulative authority of the Commission.

The point arises upon the first paragraph of section 15 of the amended act to regulate commerce. Stripping the clause of unnecessary words and eliminating from it all matter not essential to this inquiry, the language upon which the argument of the defendant is based will stand out more clearly and the question will more readily be apprehended. The clause will then read as follows:

That the Commission is authorized and empowered, and it shall be its duty, whenever, after full hearing upon a complaint made * * * it shall be of the opinion that any of the rates * * *

demanded * * * by any common carrier * * * for the transportation of persons or property * * * *or that any regulations or practices whatsoever of such carrier or carriers affecting such rates,* are unjust or unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this act, to determine and prescribe what will be the just and reasonable rate * * * thereafter * * * to be charged; *and what regulation or practice in respect to such transportation is just, fair, and reasonable to be thereafter followed;* and to make an order that the carrier shall cease and desist from such violation * * * and shall conform to the regulation or practice so prescribed.

The contention of the defendant is that its regulations and practices with respect to the distribution of coal cars among the various mines on its lines are not regulations or practices "affecting rates," and it therefore denies the authority of the Commission to intervene between it and its coal shippers with a view to controlling and reforming the manner in which the distribution is made. Its counsel says:

The law confers no power to make any order with reference to any regulation or practice of the carrier not affecting rates. Regulations as to car distribution do not affect rates, and the Commission has, therefore, no power to prescribe what regulation or practice shall be followed with regard thereto.

The point is not altogether a new one. It has been pleaded in other cases although not seriously insisted upon in argument.

21 But in this proceeding it is earnestly urged upon our attention by the defendant as decisive of the controversy and of the right of the Commission to enter an order. The question is one of very large importance. If the numerous and varied regulations and practices of carriers which enter so vitally into questions of transportation do not "affect rates," in the sense attributed by counsel for the defendant to that phrase, and therefore lie outside the jurisdiction of the Commission, our power to protect the shipping public against abuses is much less extensive than has generally been understood. There is no more insidious or effective way by which a carrier may discriminate between its shippers than through a regulation or practice that denies to them the equal enjoyment of its facilities. And if the rules of carriers with respect to car distribution are not included within the scope of the law, the prosperity of shippers, during periods of car shortage, largely lies in the hands of the carriers on whose lines they conduct their business enterprises, whenever such carriers are disposed to and do actually favor some shippers at the expense of others. By giving to one manufacturer a larger proportion of cars than he is entitled to, when the volume of his traffic is compared with that of a competitor, his business may be encouraged and built up, while the business of the competitor may be destroyed, if the Commission has no authority to intervene on his behalf. That there is need of such authority will appear from an examination of the published re-

ports of proceedings in which the Commission has found just occasion to exercise it.

The power upon complaint made to deal with unjust, preferential, and discriminatory regulations and practices of carriers was clearly vested in the Commission under section 15 of the act as it stood prior to the amendatory act of June 29, 1906. Whether or not it still exists under section 15 of the amended act must be ascertained by examining the whole act as it now stands with a view to gathering the general intent and purpose of the enactment, and then by examining the various provisions by which the intent and purpose are sought to be made effective. The underlying purpose of this legislation, as will doubtless be agreed, was to put shippers on a basis of absolute equality; to assure to them not only equal rates but an impartial enjoyment of the facilities and services of interstate carriers. That principle appears throughout the act, but nowhere more clearly than in sections 2 and 3. The former assures to shippers an equality of rates for the transportation of property under substantially similar circumstances and conditions; and the latter assures to them an equality in the opportunity to use the rates, facilities, and services of carriers. One right supplements the other. An equality in rates without an equal opportunity
22 to use the facilities of carriers would fall far short of the general objects sought to be accomplished by the Congress. On the other hand, the right to impartial treatment by carriers in the transportation of their merchandise would mean little to shippers if not accompanied by an assurance of an equality also in rates. And when we approach the consideration of any special provision in the act, this understanding of its general scope and purpose must not be lost sight of. As was said by Chief Justice Marshall in *The Durousseau v. United States*, 6 Cranch, 307, 314:

The spirit as well as the letter of a statute must be respected, and where the whole context of the law demonstrates a particular intent in the legislature to effect a certain object, some degree of implication may be called in to aid that intent.

But, while keeping in mind the general intent and spirit of the act, we are by no means to be understood as indicating that our power to deal with undue preferences and unlawful discriminations, when accomplished by carriers through unjust regulations and practices, rests upon implication; or that it is necessary by implication to inject into section 15 explanatory words that are not embraced within its text. The language of that provision is entirely sufficient in itself to enable the Commission to redress wrongs of the character complained of in this proceeding. In reaching this conclusion we are not required to resort to ingenuity in construction or to rest the argument upon a mere matter of punctuation as suggested by counsel. In our view any practice or regulation that unlawfully discriminates against one shipper and affords an undue preference to another shipper is a regulation or practice affecting rates within the meaning of that phrase as used in the clause in question. Any regulation or practice that withdraws from a shipper the equal opportunity of using and taking advantage of the rates offered by a carrier

to the public is clearly a regulation or practice affecting rates in the sense in which that phrase is used in the amended act at the point in question. To hold otherwise, as the defendant urges, would be to put the narrowest possible construction upon those words, in disregard of the general objects and purposes of the enactment. And this we are not warranted in doing under any recognized rule of statutory construction, and more especially when a remedial statute is under consideration. After having vested in the Commission the power to redress wrongs arising out of unreasonable and unjust rates, we are not ready to accept the view that the Congress has contented itself with a mere admonition in the law against the great wrongs that may be done against shippers through unjust regulations and practices. That as counsel contends is exactly what has happened. Although Congress has declared such practices to be unlawful, counsel insists that it has omitted to give us the power to correct
23 them. Setting aside as beyond the reach of the Commission the great body of rules, regulations, and practices of carriers that have to do with transportation, he says:

Examples of regulations affecting rates are those fixing maximum and minimum carload weights, and that contained in the fourth clause of the uniform bill of lading which provides that all property transported shall be subject to necessary cooperage and baling at the owner's cost.

The maximum or minimum weight of a carload is not something affecting the rate, but is in fact a part of the rate, a factor which is just as essential to a correct statement of the rate as is the rate per 100 pounds itself. Nor do cooperage and baling affect the rate as such. They are simply special services performed by the carrier in transit when it is necessary to protect the shipment from damage or loss. Such services neither increase nor diminish the rate, but are charges entirely apart from the rate. While no other examples of rules or practices affecting rates are vouchsafed us by counsel to illustrate his conception of the meaning of that phrase, apparently he construes it as referring to rules or practices which in some way increase or diminish the amount of freight charges that the shipper must pay on a shipment.

The text itself does not justify that construction of the provision in question. It will be observed that the clause divides itself naturally into two parts; it authorizes the Commission, first, to consider the wrong alleged, and then to apply the remedy. If it shall be of the opinion after a full hearing that the regulation or practice complained of is unreasonable and unjust, the Commission may remedy the wrong by prescribing a just and reasonable regulation or practice thereafter to be followed by the carrier. In the first part of the provision reference is made to regulations or practices "affecting rates;" the remedy offered by the provision consists in the prescribing by the Commission of a just and reasonable regulation or practice with respect to "transportation." While there is here some contradiction in the words used, we do not understand that there is any contradiction in the real substance of the clause or in its meaning. Each part of the clause has a necessary relation to the other

part, and the words "regulations" and "practices" as used in both parts must necessarily be used in the same sense. If they are not so used it is difficult to see how a wrongful regulation or practice "affecting rates," in the sense of affecting the amount of the freight charges on a shipment, could ordinarily be cured by the substitution, as the clause now under consideration provides, of a just or reasonable regulation or practice in respect to "transportation." Obviously the two phrases refer to the same kind of regulations and practices, namely, the regulation and practices under which the trans-
24 portation of interstate carriers is conducted. When both phrases are considered together and the whole clause is read in the light of the great purposes underlying the act, there is little difficulty in reaching the conclusion that the words "any regulations or practices whatsoever * * * affecting such rates" are used synonymously with the words "regulation or practice in respect to such transportation;" and that both clauses are to be read in the widest possible sense and embrace all regulations and practices of carriers under which they offer their services to the shipping public and conduct their transportation. We find no difficulty in holding, under section 15 of the amended act, that ample authority is vested in the Commission to deal with the undue preferences and unlawful discriminations forbidden under sections 2 and 3 and elsewhere in the act, regardless of the form of the rule, regulation, or practice under which such wrongs may be perpetrated.

Having disposed of the defendant's contention with respect to the question of jurisdiction, we come now to a consideration of the merits of the controversy. The first complaint made of the defendant's rules regulating the distribution of coal cars is that they do not provide that private cars belonging to individual operators shall be charged against their respective percentages, but permit them to be received by the individual mines in addition to the system cars which they are respectively entitled to in the general distribution. The same complaint is made with respect to what are ordinarily referred to as foreign railway fuel cars that are sent into the mining districts on the lines of the defendant by connecting lines, and are billed or manifested to particular mines with which the connecting carrier has made arrangements for securing the coal required for its own use. Under the defendant's rules these cars are delivered to the operator to whom they are consigned or manifested, without being charged against his percentage in the general distribution. And these practices the complainants insist are discriminatory in their results and therefore unlawful. These questions have been presented and elaborately argued before the Commission in other proceedings, and have had exhaustive and careful consideration. They will not, therefore, be further considered in connection with this complaint. It will suffice to say, in accordance with the announcement made in *Railroad Commission of Ohio v. Hocking Valley Ry. Co.*, 12 I. C. C. Rep., 398, that the view of the Commission is that the practice of the defendant in not charging private or individual cars against the percentages of the operators receiving them is unlawful and that such operators are not entitled in the

general distribution of available cars to receive their respective proportions of the system cars in addition to their private cars.
25 A like ruling must be made with respect to foreign railway fuel cars. As to the cars used by the defendant to secure its own supply of railway fuel no point is made in the complaint and no discussion was had on the argument. We shall therefore take no action with respect to such equipment. The principle clearly announced in the case referred to, both with respect to the so-called private cars and the so-called foreign railway fuel cars, is that while a carrier, during percentage periods, may not assign the private cars to operators other than their owners, and may not assign foreign railway fuel cars to any mines except those to which they have been manifested by the foreign line, it must nevertheless count all such cars against the distributive share of the respective mines to which the private cars belong or the foreign railway fuel cars have been consigned; and in case the private cars or foreign railway fuel cars so delivered to a mine do not fill out its distributive share of available cars, enough system cars are to be added to make up its share according to its rating. And that principle must control the defendant's course in the future with respect to such cars. It may be well, however, at this time to say for the general information of those interested in such matters that in this proceeding, as well as in other proceedings that have come before the Commission, too little stress has been laid upon the very obvious relation between a shortage in cars and an insufficiency in motive power, in sidings, in tracks, in train crews, and other facilities necessary to the movement of traffic. A shortage of cars on a particular line does not mean that the supply of cars of that carrier has been diminished in number, but only that the volume of traffic offered exceeds the capacity of its available equipment to move it. A shortage in cars usually, if not invariably, is accompanied by a shortage in some one or more of the other facilities of the carrier. When it has not enough coal cars, it usually has not enough locomotives and other facilities to meet the demands of its coal shippers. That was the case in the *Hocking Valley case, supra,* and in this record sufficient testimony of that tenor appears to lend support to the disposition here made of that portion of the complaint. But this element in a shortage situation must not be overlooked by litigants who complain of the methods of carriers in the distribution of their equipment. Its importance is very clear. The mere ownership of a private car gives to the owner no superior right to use the facilities of the carrier in transporting it; it gives to him no right to have his private car attached to a locomotive in preference to a system car loaded by another shipper. The ownership of a private coal car or the possession of a foreign railway fuel car can give to an operator no preferred right to have it occupy a carrier's sidings or other tracks as against a system car loaded by another coal operator, or to have it handled by a train crew in preference to a system car. When any of these
26 general facilities are insufficient to move all the traffic offered, no operator has a superior right over another merely because he enjoys the advantage of owning private cars or has fuel con-

tracts with connecting lines. And this shortage in other facilities which, as heretofore stated, rarely, if ever, fails to accompany a shortage in cars, has an important bearing upon the matter of the distribution of cars, and underlies what the Commission has said on those questions in its formal decisions.

In support of the allegation that system cars are arbitrarily allotted to certain operators without regard to their percentage rating, the complainant's proof was very meager. The right of a carrier to make such arbitrary allowances for the purpose of enabling the owner of a mine reasonably to develop it, so as to put it in a condition to operate and make shipments, has been recognized, and we see no grounds for disturbing the right in this case. But any arbitrary allowance of cars made to an operator on other grounds should be closely scrutinized, and is an unlawful discrimination unless justified by special conditions. Without going into the details of the record in this connection, it will suffice to say that the defendant must adjust its practices in that respect in accordance with these well-defined principles. We shall expect no less of it with respect to the allegation that there has been discrimination in the distribution of cars between the several mining districts on its lines. There is very little specific testimony in the record to support this contention, but enough appears to suggest that the matter should be carefully reexamined by the defendant with a view to a more perfect apportionment of its equipment between the several districts. A fixed rule governing the distribution of cars among various districts presents a difficult problem. But we do not regard it as a difficult matter to arrive at some method that will have due regard to transportation conditions and at the same time will produce reasonably equitable results. On both these questions we shall make no order for the present, the record, as we understand it, not disclosing a sufficient basis for definite action.

The matter most discussed on the hearing as well as upon the argument was the method adopted by the defendant in rating mines for the purpose of establishing the percentage of available car equipment to which they are respectively entitled in the daily distribution of cars during those periods when the demand for coal cars exceeds the supply. In this respect the basis of distribution long in force on the lines of the defendant differs from that adopted by other carriers whose methods for distributing cars have come before us upon formal complaint. In 1902 the defendant established a percentage basis consisting of two principal factors, (*a*) the physical capacity of the mine, and (*b*) the commercial capacity. The physical ca-
27 pacity is determined by the thickness of the coal seam, the number of rooms or working places, the capacity of the underground tram tracks, and the facilities for getting the coal out of the mine into the tipple, and from the tipple into the cars. A fixed per diem value is assigned to a man's labor, taking into consideration the character of the seam upon which the work is to be done; and the number of places in which a man can work is taken into account regardless of the number of men actually employed. This in substance is the method generally adopted in arriving at the physical capacity of mines. But the defendant takes into consideration also

what is referred to in the record as the commercial capacity of the mine, that is to say, the actual requirements of a mine for cars as tested by actual shipments made by the mine. This factor is arrived at by taking the volume of shipments made by the mine during a period of free car supply, usually of four months and generally from April 1 to August 1, in each of the two preceding years. In figuring the actual shipments made by a mine during these two free car periods, all its shipments are included except the shipments of fuel coal to the defendant company. These three factors, namely, the physical capacity, the commercial capacity for the first year, and the commercial capacity for the second year, are added together and divided by three. The result is the capacity basis for determining the percentage of available cars that a particular mine is entitled to receive during percentage periods.

This method of rating mines was adopted by the defendant in 1902, after a careful examination of the various systems in force on other lines. It was intended as a compromise between ratings based on physical capacity only and ratings based on commercial capacity only. The physical capacity basis is already well understood. The objection found by the defendant in that system was much like the defect condemned by the Commission in *Pocahatan Coal & Coke Co. v. Norfolk & Western Ry. Co.*, 13 I. C. C. Rep., 69. In that case it appeared that the percentage rating of mines on the Norfolk & Western was based upon the number of coke ovens that had been erected by the respective operators. Many of the mines had erected coke ovens largely in excess of their requirements and solely for the purpose of increasing their percentages. The record showed that in the whole district but 52 per cent. of the ovens that had been built were in actual operation. The ruling of the Commission was that the mere number of ovens erected by a particular mine did not fairly measure its relative rights in the distribution of cars. In an examination of the situation on its lines, the defendant observed a like tendency. For the purpose of increasing their car percentage, the operators were developing the physical capacity of their mines
28 beyond their actual selling capacity. This was an economic waste for which the system adopted by the defendant was intended as a partial cure. Ratings based upon commercial capacity only are used on some lines and are built up on what is called the "surprise" test. Without previous notice a carrier for three or four days will supply a mine with all the cars that it can use, and in this way a test is made of its actual requirements. The defect in this system was that in some way the mine owner would learn that a test was about to be made and could thus prepare for it. The system in force on the lines of the defendant combines these two theories of distribution. By taking the physical capacity as one factor and as the other factor the commercial capacity, tested not during a period of three or four days only, but during the substantial period of four months in each of two years when cars are abundant and can be supplied in sufficient numbers to meet all the requirements of the mines, it was thought by the defendant that a more equitable distribution would result. Manifestly a mine having a small physical capacity,

but which has secured large contracts, would prefer a system based on commercial capacity only. On the other hand an operator of a mine having a large physical capacity, but which has no large contracts, would prefer a system based upon physical capacity only. In combining the two systems the defendant has adopted a middle ground, apparently upon the thought that neither the physical nor the commercial capacity is always a fair test. We are not prepared on this record to say that there is no force in that view, and that a system of mine rating based upon a combination of the physical and commercial capacities of the several mines does not more closely approximate the actual car requirements of the mines than a system based upon physical capacity only.

But it is insisted by the complainant that the mine receiving foreign railway fuel cars and private cars during the free car periods is thereby able to increase its percentage rating as compared with the operator who receives no foreign fuel or private cars. It is urged that the operator who happens to have contracts for delivering coal during the free car periods, or whose sales are increased during those periods because of personal connections with coal dealers and consumers, is given an undue advantage when, in addition to the physical capacity, the actual shipments for the two preceding years are added for the purpose of arriving at his percentage basis; and that the method of rating mines by taking into consideration the previous shipments not only results in increasing the percentage of certain operators but ultimately results in increasing the actual physical capacities of such mines. It may be that this is true. But is the defendant's system of car distribution on that account
29 necessarily unlawful? It is not unlawful for coal operators to have contracts to supply connecting railway lines and private industries; and it does not follow because a large operator has large contracts that he is getting an undue or unlawful advantage under this system of car distribution over smaller operators in the same district. While the operator with large contracts may be able to keep his mine running more constantly and at a lower cost per ton, and may develop it more rapidly and thus in the progress of time be able to enlarge its percentage in the car distribution, nevertheless if that opportunity be open under the defendant's rules and regulations to all operators we do not clearly see on what ground the system must be condemned. Certainly the record does not advise us of any specific instances of discriminatory results to the smaller operators arising out of the defendant's system. The attack upon it is based largely upon the mere opinions of a few operators who testified that the system was unfair to operators having no contracts. As the record now stands the Commission is asked to hold, as a matter of law rather than as a fact demonstrated by actual experience, that the defendant's method of rating mines is unduly discriminatory, and that the only proper and lawful basis for the distribution of coal cars among the mines of a coal district is their respective and relative physical capacities.

Neither this record nor the records in other proceedings and investigations relating to coal-car distribution justify us in holding

as a fixed rule of law that the physical capacity of the several coal mines in a given district is the only lawful factor upon which a system of car distribution may be built up, and that their actual requirements or commercial capacity may not lawfully be considered in the distribution. As at present advised the Commission is not in possession of sufficient information upon which to base such an announcement for general application. It seems to be rationally and logically a question of fact to be determined according to the circumstances and conditions existing in each particular case. When examined from that point of view no such showing is to be found in this record as will enable us properly to enter an order sustaining the complaint in that respect. The present system of rating mines has been in effect on the lines of the defendant for some years. Apparently it is satisfactory to the great body of the coal operators served by the defendant; out of the 340 mines on its lines operated by about 200 different companies, only three or four operators are shown by the record to be of the opinion that the percentage basis works unfairly and disadvantageously. Upon such a showing we are unwilling to disturb the situation and see no just grounds for doing so. But we base this view on the record only and are not to be understood as closing the question to further consideration. All we desire to be understood as saying at this time is that a method of mine rating that is apparently satisfactory to the great body of coal operators on a carrier's line ought not to be disturbed except upon a stronger showing than is here made.

30 & 31

Finally complaint is made of what is called "pooled percentages." The defendant permits the car percentages of several mines controlled or operated by one company to be grouped or pooled upon one or more of the mines; that is to say, if a company owning and operating four openings is entitled in the daily distribution to 25 cars for each mine it may group or pool all these cars or any portion of them at one mine instead of using them at each mine in accordance with their respective percentages. This practice is complained of as an unjust discrimination on the ground that it permits a mining company rapidly to develop one mine after another and thereby to increase the percentage ratings of the several mines; and also that it enables a mining company to operate one or more of its several mines to a larger daily capacity and thereby reduces the cost per ton of the coal produced. Here also the record is lacking in sufficient facts and leaves us to a consideration of this complaint as a hypothetical one and as a question of law. Without committing ourselves at this time to any final opinion on the question, it will suffice to say that no sufficient showing has been made to enable us to say that this practice is unlawful and results in fact in undue and unlawful discriminations.

An order will be entered to give effect to these views.

32 *Order.*

At a General Session of the Interstate Commerce Commission, Held at its Office in Washington, D. C., on the 2nd Day of June, A. D. 1908.

Present: Martin A. Knapp, Judson C. Clements, Charles A. Prouty, Francis M. Cockrell, Franklin K. Lane, Edgar E. Clark, James S. Harlan, Commissioners.

No. 1322.

RAIL & RIVER COAL COMPANY
v.
BALTIMORE & OHIO RAILROAD COMPANY.

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its conclusions thereon:

It is ordered, That the defendant, the Baltimore & Ohio Railroad Company, be, and it is hereby, notified and required, on or before the 1st day of August, 1908, to cease and desist, and during a period of at least two years thereafter to abstain, from maintaining and enforcing, with respect to interstate shipments of coal, the present practice or regulation of failing or refusing, in times of coal car shortage, to count railway fuel cars and leased or so-called private coal cars against the distributive shares of available system coal cars which the coal operators, to whom said leased or so-called private coal cars belong or said foreign railway fuel cars are consigned, are entitled to according to the ratings of their respective mines.

It is further ordered, That said defendant be, and it is hereby, notified and required to establish, on or before said 1st day of August, 1908, and during a period of at least two years thereafter to maintain and enforce, with respect to interstate shipments of coal, a practice or regulation which, in times of coal-car shortage, shall require foreign railway fuel cars and leased or so-called private cars to be counted against the distributive shares of available cars to which the respective operators, to whom the leased or so-called private cars belong or foreign railway fuel cars are consigned, are entitled according to the respective ratings of their mines; and that the said leased or so-called private cars shall always be delivered to the operators owning them and the said foreign railway fuel cars shall always be delivered to the operators to whom they are consigned by said foreign railway; and that in case said leased or so-called private cars or foreign railway fuel cars so delivered to the operator owning them or to whom they have been consigned are not sufficient in number to fill out his distributive share of available system cars, enough system cars are to be added

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to make up his share according to the rating of his mine as fixed and determined by the system of mine rating on the lines of the defendant.

34 & 35 I, Edward A. Moseley, Secretary of the Interstate Commerce Commission, do hereby certify that the papers hereto attached and entitled Report and Order of the Commission are true copies of the originals now on file in the office of this Commission.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of the Commission, this 23rd day of June, 1908.

[SEAL.] E. A. MOSELEY, *Secretary.*

36 *Subpœna.*

Issued July 20th, 1908.

THE UNITED STATES OF AMERICA,
District of Maryland, To wit:

To the Interstate Commerce Commission, Greeting:

[SEAL.] You are hereby commanded that all excuses and delays set aside you be and appear at the Clerk's office of the Circuit Court of the United States for the Fourth Circuit in and for the District of Maryland on the first Monday in September next, to answer unto the bill of complaint of the Baltimore and Ohio Railroad Company in said court exhibited against you. Hereof you are not to fail at your peril, and have you then and there this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 20th day of July in the Year of Our Lord, 1908.

Issued 20th day of July, 1908.

ARTHUR L. SPAMER, *Clerk.*

MEMORANDUM.—The defendant is required to enter its appearance in the suit in the Clerk's Office on or before the first Monday of September next; otherwise the Bill may be taken *pro confesso.*

The above subpœna endorsed:

Served copy of within Subpœna and copy of the bill of complaint in this case on the Interstate Commerce Commission by service on Martin A. Knapp, Chairman. July 22, 1908. Aulick Palmer, U. S. Marshal for District of Columbia.

37 *Certificate of the Attorney General.*

Filed July 27th, 1908.

In the Circuit Court of the United States for the District of Maryland.

BALTIMORE AND OHIO RAILROAD COMPANY
v.
THE INTERSTATE COMMERCE COMMISSION.

To the clerk of said court:

I hereby certify that the above entitled cause now pending in said court is a suit in equity brought by the Baltimore and Ohio Railroad Company against the Interstate Commerce Commission, under the Act of Congress entitled "An Act to regulate commerce," as amended by the Act of June 29, 1906, and that said suit is in my opinion a case of general public importance.

I therefore request that, complying with the provisions of the Act of Congress entitled "An Act to expedite the hearing and determination of suits in equity pending or hereafter brought under the act of July 2, 1890, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' 'An Act to regulate commerce,' approved February 4, 1887, or any other acts having a like purpose that may be hereafter enacted, "approved February 11, 1903; and in further compliance with the provisions contained in Section 16 of the "Act to regulate commerce," approved Jule 29, 1906, you will file this certificate among the records of the above entitled cause, and immediately furnish a copy thereof to each of the Circuit Judges of the Fourth Circuit, to the end that said
38 case shall be given precedence over other cases in said court, and be assigned for hearing at the earliest practicable date before not less than three of the Circuit Judges of said Circuit, as is provided by the said Act of February 11, 1903.

CHARLES J. BONAPARTE,
Attorney General.

Washington, D. C., July 22nd, 1908.

39 *Order of Circuit Judges Designating Hon. Thomas J. Morris to Sit with Them at the Hearing and Disposition of This Case.*

Filed August 26th, 1908.

United States Circuit Court, District of Maryland.

In Equity.

BALTIMORE & OHIO RAILROAD COMPANY, Complainant,
vs.
THE INTERSTATE COMMERCE COMMISSION, Defendant.

In accordance with the provisions of the Act of Congress approved February 11, 1903, an act to expedite the hearing of certain suits in equity, Vol. 32 Stat. at Large, part 1, page 823, it is hereby ordered that Hon. Thomas J. Morris, United States District Judge for the District of Maryland, be, and he hereby is designated to sit with the two Circuit Judges of the Fourth Circuit on the hearing and disposition of this cause.

NATHAN GOFF,
Circuit Judge.
J. C. PRITCHARD,
Circuit Judge.

40 *Petition of Complainant for an Order to Set Application for Preliminary Injunction for Hearing.*

Filed August 22nd, 1908.

In the Circuit Court of the United States for the District of Maryland.

In Equity.

THE BALTIMORE AND OHIO RAILROAD COMPANY, Complainant,
vs.
THE INTERSTATE COMMERCE COMMISSION, Defendant.

Comes now the complainant, The Baltimore and Ohio Railroad Company, and petitions the Court for an order setting a date for a hearing of the application of this complainant for a preliminary injunction as prayed in the Bill of Complaint filed in this case, and requiring the said defendant to show cause if any it has at a date to be fixed by the Court, why a preliminary injunction should not be granted as prayed in said Bill, and prescribing dates on which affidavits in support of said application for a preliminary injunction

and in opposition to said application shall be filed by the parties herein.

And your petitioner will ever pray, etc.

W. A. PARKER,
W. IRVINE CROSS,
Solicitors for Complainant.

41 *Order Setting Application for Preliminary Injunction for Hearing, &c.*

Filed August 26th, 1908.

In the Circuit Court of the United States for the District of Maryland.

In Equity.

THE BALTIMORE AND OHIO RAILROAD COMPANY, Complainant,
vs.
THE INTERSTATE COMMERCE COMMISSION, Defendant.

Upon motion of the Complainant, It Is Ordered by the Court, this 26th day of August, 1908, that the application of the complainant for a preliminary injunction as prayed in the Bill of Complaint filed in this case be set for hearing at Baltimore, Maryland, on the 22d day of September, 1908, and that the defendant show cause, if any it has, on or before the 22d day of September, 1908, why a preliminary injunction should not be granted as prayed in said Bill; provided that a copy of said Bill of Complaint and of this order be served upon defendant on or before the 31st day of August, 1908, the complainant to have until the 9th day of September, 1908, to file affidavits in support of its said application; defendant to have until the 18th day of September, 1908, to file affidavits in its behalf, and the complainant to have until the 22d day of September, 1908, to file affidavits in rebuttal, if such shall be deemed necessary.

NATHAN GOFF,
Circuit Judge.

Endorsed: Served copy of within order on defendant by service on William H. Connolly, Chief Clerk of defendant Aug. 29, 1908. Aulick Palmer, U. S. Marshal, Dist. of Columbia.

42 *Appearance for Defendant.*

Filed September 5th, 1908.

In the Circuit Court of the United States for the District of Maryland.

THE BALTIMORE & OHIO RAILROAD COMPANY, Complainant,
vs.
THE INTERSTATE COMMERCE COMMISSION, Defendant.

The Clerk will enter my appearance as Counsel for the defendant.

LEWELLYN A. SHAVER,
C/o Interstate Commerce Commission, Washington, D. C.

43 *Answer of the Interstate Commerce Commission.*

Filed September 19th, 1908.

44 In the Circuit Court of the United States for the District of Maryland.

No. 54. Equity Docket F.

THE BALTIMORE & OHIO RAILROAD COMPANY
v.
THE INTERSTATE COMMERCE COMMISSION.

The Answer of the Interstate Commerce Commission, Defendant Herein, to the Bill of Complaint of the Above-named Complainant.

This defendant, the Interstate Commerce Commission, now and at all times hereafter saving to itself all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties, and imperfections in the said bill contained, for answer thereto or to so much thereof as this defendant is advised it is material or necessary for it to make answer, answering saith:

I.

That this defendant is a bureau or department of the Government of the United States which was created and established and now exists under and by virtue of an act of the Congress of the United States entitled "An act to regulate commerce," approved February 4, 1887, as amended by subsequent acts and particularly as amended by the act of June 29, 1906, and that the complainant, the said Baltimore & Ohio Railroad Company, is a common carrier engaged in the interstate transportation of passengers and property wholly by railroad or partly by railroad and partly by water, and as such com-

mon carrier and in respect to such transportation is subject to the provisions of said act entitled "An act to regulate commerce" and acts amendatory thereof.

II.

That by section 12 of said act this defendant is given authority to inquire into the management of the business of all common carriers subject to the provisions of the act and is required to keep itself informed as to the manner and method in which the same is
45 conducted and "to execute and enforce the provisions of the act;" and that among the provisions of the act which this defendant is required to execute and enforce is the provision of section 1 thereof that it shall be the duty of all carriers subject to the act to furnish upon reasonable request therefor cars and other vehicles and all instrumentalities and facilities of shipment or carriage and perform all necessary and proper services in connection with the receipt, delivery, and transportation of property delivered to such carriers for carriage, and also the provision of section 15 thereof authorizing this defendant "to determine and prescribe" what regulation or practice in respect to transportation of passengers and property is just, fair, and reasonable to be thereafter followed, and to make an order requiring conformity on the part of such carriers to the regulation or practice so prescribed, and also the provisions of section 3 thereof, which declares that "it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

III.

That by section 13 of said act it is provided that, amongst others, any person, company, firm, corporation, or association may make complaint to this defendant "of *anything* done or omitted to be done by any common carrier subject to the provisions of the act in contravention of the provisions thereof," and that this defendant shall, after due notice to the carrier or carriers complained of, "investigate the matters complained of in such manner and by such means as it shall deem proper," and by section 14 it is provided that whenever an investigation shall be thus made by this defendant "it shall be its duty to make a report in writing in respect thereto," stating its "conclusions, together with its decision, *order*, or requirement in the premises."

IV.

That on November 8, 1907, in strict conformity to the provisions of the law referred to in the preceding paragraph of this answer, the Rail & River Coal Company, a corporation under the laws of West Virginia, owning and operating a coal mine on the Newark Division of the Baltimore & Ohio Railroad Company (complainant herein),

made complaint to this defendant against said Baltimore &
46 Ohio Railroad Company, alleging violations of the provisions of said act to regulate commerce in the matter of the distribution of coal cars among the operators of coal mines on its lines, including said Rail & River Coal Company, as hereinafter specifically set forth, and this defendant after said complaint had been fully presented to it both in the way of testimony and argument in behalf of both parties and after having investigated and considered the facts and questions presented, made a report in writing in respect thereto, setting forth in said report the material facts as found by this defendant from the testimony before it and the conclusions of this defendant therefrom, together with its order in question in this case. A copy of said report and order is hereto attached as Exhibit B, and prayed to be taken as a part hereof.

V.

That among other violations of the law charged in said complaint, the Rail & River Coal Company alleged therein that said Baltimore & Ohio Railroad Company unjustly and unduly discriminated against it and other owners and operators of coal mines along the lines of said railroad company engaged in shipping coal to points in different States, in that while said railroad company during periods of coal car shortage from day to day distributed its cars to be loaded with coal from mines along its lines according to ratings established by it as to the several and respective capacities of such mines, it did not in such distribution take into account or consider certain so-called "foreign railway fuel cars," claimed to be consigned by other railroads to certain mines upon the lines of said railroad company, and also did not take into account or consider certain so-called "private cars" owned or claimed to be owned by operators of coal mines upon the lines of said railroad company and by consignees and furnished by such consignees to said operators; but that said railroad company delivered such "foreign railway fuel cars" and such "private cars" to such mines in addition to the distributive shares of cars to which such mines might be entitled under the aforesaid distribution. The said complaint of said Rail & River Coal Company to this defendant is hereto attached as Exhibit A and made a part of this answer.

VI.

That this defendant, after due investigation of the matters alleged in said complaint, sustained the charges therein as to said two classes of cars, to wit, "foreign railway fuel cars" and "private" cars, as appears from its report and opinion, Exhibit B hereto, and issued the order involved herein requiring the Baltimore & Ohio Railroad Company on or before the first day of August, 1908, to cease
47 and desist, and during a period of at least two years thereafter to abstain, from maintaining, with respect to interstate shipments of coal, the said practice or regulation of failing or refusing, in times of coal car shortage, to count "foreign railway fuel cars" and "private" cars against the distributive shares to which

the coal operators, to whom said two classes of cars are assigned, are entitled according to the ratings of their respective mines; and the defendant alleges that the failure to take into account or consider said two classes of cars in determining, as aforesaid, the distributive share of cars to which each mine is entitled under its rating and the assignment thereof to certain mines or mine operators in addition to the full distributive shares of such operators in the general distribution of coal cars, is in violation of said section 3 of the act to regulate commerce in that it gives an undue or unreasonable preference or advantage to the coal mine operators to whom said two classes of cars are assigned, and subjects to an undue or unreasonable prejudice or disadvantage the other coal mine operators to whom such cars are not assigned.

VII.

That said undue or unreasonable preference or advantage and undue or unreasonable prejudice or disadvantage necessarily result from the following undisputed facts:

(*a*) The defendant, in rating mines for the purpose of establishing the percentage of available car equipment to which they are respectively entitled in the daily distribution of cars during those periods when the demand for coal cars exceeds the supply, uses as a basis for such percentage distribution two factors: First, the physical capacity of the mine counted as 1, and, Second, its commercial capacity counted as 2, and the latter is determined by the volume of shipments made by the mine during a certain period of each of the two years preceding the rating. The larger the number of cars assigned to a mine the greater will be the stimulus for development or increased production, as well as the greater the capacity of the mine for actual shipments. The method, therefore, of rating mines based on previous actual shipments as a predominating factor, taken in connection with the allotment to certain mines of foreign railway fuel cars and private cars, increases the rating of such mines and gives them larger percentages of cars in the general distribution during periods of car shortage not only than they would otherwise receive, but also than are received by other operators with mines of equal physical capacity to whom such cars are not assigned. The supply of car equipment of such favored mines is thus increased both by the actual number of foreign railway fuel cars and private cars assigned to them, and also by the increased rating resulting from such assignment.

48 (*b*) The operator receiving the foreign railway fuel cars and private cars may develop or operate his mine to a fuller extent than can the operator of a mine of equal physical capacity who does not receive such cars.

(*c*) As between mines of equal physical capacities, the amount of their respective commercial outputs or shipments is limited by car supply. The greater the car supply the greater will be the output, and the greater the output the less the cost of production per ton. The operator, therefore, having the advantage in car supply, can make greater profits on his coal or undersell his competitors.

(*d*) The fuller and more steady the supply of cars the greater is the number of days during a given period a mine can be run, and this cheapens the cost of production because of the fixed charges which accrue whether the mine is operated or not, such as the pay of engineers, firemen, foremen, and superintendents, who are employed and paid by the month (whether they work the entire month or not), the feed of mules and horses, the cost of ventilation and pumping of mine, and other expenses.

(*e*) The contracts for coal between the mine operators and the complainant are, as a rule, offered to operators at prices named or fixed by the railroad company, and such operators, by reason of the cars furnished them in addition to their full quota on general distribution, are enabled to produce and sell such coal cheaper than they otherwise could and, in fact, sell coal to the railroad company at a price lower than the prevailing price upon commercial coal, and the railroad company thus derives a profit to itself from its undue preference of such favored mine operators and the undue prejudice to which it subjects other operators not so favored.

(*f*) Giving to certain mines "foreign railway fuel" cars and "private" cars in addition to their full quota of cars on general distribution when such additional cars are not given to other mines enables the former to run more nearly to their full capacity than can the latter and to give steadier employment, and thus secure a better class and fuller supply of operatives.

(*g*) The operators of mines receiving "foreign railway fuel" cars and "private" cars are thereby enabled to make contracts for the delivery of coal distributed over long periods to a greater extent than can the mine operators not so favored or preferred.

(*h*) The said "foreign railway fuel" cars and "private" cars occupy the tracks and sideways of the complainant, are drawn by its locomotives, operated by its employees, and must lessen the facilities in those respects of mine operators to whom they are not assigned, and should, therefore, be counted or taken into account in determining the pro rata share in the general coal car distribution of the operators to whom they are assigned.

49 VIII.

That the fact, if it be a fact, as set forth in the affidavit of Arthur Hale, general superintendent of transportation of complainant, filed in this case in behalf of complainant, that the admitted coal car shortage during the fall and winter months results from the detention of cars on foreign railroads and at terminals on the railroad of complainant and from fluctuations in the amount of coal tendered by coal mine operators for transportation, and other causes mentioned in said affidavit, and is not caused "by a deficiency in motive power, employees, tracks, terminals, sidings, or other facilities necessary for the movement of said cars," can have little bearing, if any, on the question in this case, which is not whether the car shortage is excusable or unavoidable, but whether complainant's system of distribution of available cars among the coal operators on its lines is just and fair or unjust and discriminatory. If coal car shortage is unavoid-

able and is not the fault in any degree of complainant, this does not excuse an unfair distribution of the available car supply or relieve complainant of the duty of treating all its patrons alike and placing them upon a basis of absolute equality.

IX.

That the complainant is a common carrier by railroad and as such operates a public highway and is therefore bound to treat all its patrons alike, giving to no one or class of such patrons any special privileges denied to others; that, as held by the Supreme Court, "equality is the great purpose of the interstate commerce act," and this defendant "is charged with the duty of seeing that that equality of right shall be secured to all patrons" (167 U. S., 506; 169 U. S., 544; 164 U. S., 596-597; 94 U. S., 126-130; 200 U. S., 391); and that the privileges and advantages given by complainant as shown in paragraph VII of this answer to certain coal operators on its line are not and can not be justified on the ground that they result in a benefit to complainant as well as to said favored operators.

X.

Defendant denies that, as alleged in paragraph 10 of the bill of complaint herein, the order of defendant in question is "unlawful, null, and void" on any of the grounds named in said paragraph or on any grounds whatever, and alleges that said order is a proper, lawful, and necessary exercise of the authority conferred, and performance of the duty imposed, upon defendant by the provisions of the act to regulate commerce set forth in paragraphs II and III of this answer.

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XI.

Defendant denies that, as alleged in subdivisions "Second" and "Third" of paragraph 10 of said bill of complaint, defendant "made and issued its decision and order involved herein without consideration of the facts legally and properly proved in evidence in the case before it of the Rail & River Coal Company against complainant, and did make and issue said decision and order upon and by reason of an erroneous assumption of law and upon facts alleged to have been found by the Commission from the evidence adduced before it in other proceedings, to none of which proceedings complainant was a party."

Defendant alleges that in the said case before it of the Rail & River Coal Company, the questions involved were fully presented both by argument and voluminous testimony in behalf of both parties thereto, and said argument and testimony were duly weighed and considered by the defendant, and its decision and order were based thereon and fully justified thereby; that the same questions had been passed upon by the defendant in another case (*Railroad Commission of Ohio v. Hocking Valley Ry. Co.*, 12 I. C. C. Rep., 398), and the said testimony and argument in said case of the Rail & River Coal Company against complainant did not warrant or call

for a change of opinion by this defendant, and defendant accordingly made in its opinion in the latter case the statement quoted in complainant's bill of complaint that the "questions so decided would not be further considered," meaning thereby that there was no ground shown for its reversal of the conclusion already arrived at as to those questions.

The defendant further alleges in this connection that the burden is upon the complainant in this case to show clearly to the satisfaction of the court that the order of the Commission in question is of such a character that it should not be enforced, and it is not sufficient to raise a mere doubt in the mind of the court; that the bill of complaint in this case does not set forth or in any way make a part thereof the evidence adduced on the hearing before this defendant, and upon which the conclusions and order of this defendant involved in this case are based, and it is not alleged or shown in said bill that said order is not justified by the weight of said evidence.

XII.

That by section 16 of the act to regulate commerce, as amended June 29, 1906, it is provided that "if, upon such hearing" of a case to enforce order of the Commission, "as the court may deem necessary, it appears that the order" of the Commission "was regularly made and duly served, and that the carrier is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction, or other proper process mandatory or otherwise;" that the order in question herein was, as alleged in Paragraphs IV and VI of this answer, "regularly made and duly served," and the bill of complaint herein admits these facts and also that the complainant is in disobedience of said order; that, these things being so, it is the duty of this court to enforce said order unless it is made to appear to the court that said order is "so arbitrary or unreasonable as to transcend the limits of regulation, and to be in effect either a denial of due process of law or a deprivation of the equal protection of the laws or a taking of property without compensation," or otherwise unconstitutional; and that there is no allegation in said bill of complaint, or any fact or matter set up therein, showing or tending to show that said order is of such character.

51

XIII.

Defendant admits that, as alleged in Paragraph VIII of the bill of complaint herein, this honorable court, in the case entitled *"United States ex rel. Pitcairn Coal Company v. Baltimore and Ohio Railroad Company et al."* on July 8, 1907, entered its judgment or decree for the issuance of a peremptory writ of mandamus in accordance with its opinion filed June 11, 1907, holding that, as found by this defendant in the said case before it of the Rail & River Coal Company, private cars assigned to a mine should be taken into account in determining the pro rata share of said mine in the general distribution of cars and that the relator, the Pitcairn Coal Company, was entitled to have allotted to it its percentage of all

the available car supply equipment, whether general or private, and that said coal company and other coal companies in like situation with it are subjected to an unreasonable disadvantage in getting only a percentage of the Baltimore and Ohio equipment, after having first eliminated therefrom the private cars; but that the not taking into account of foreign railway fuel cars in establishing the basis of distribution was not an unreasonable discrimination against said Pitcairn Coal Company and was allowable.

Defendant further admits the allegations in Paragraph VIII of said bill, that on petition of complainant and several of the coal-mining companies parties to the suit supersedeas of said decree was allowed by this honorable court, a bond of $300,000 being required and given, and that from so much of the decree of this honorable court as allowed the prayer of the Pitcairn Coal Company as to private cars the complainant herein appealed to the Circuit Court of Appeals of the United States for the Fourth Circuit, and from so much thereof as disallowed the prayer of said coal company as to foreign railway fuel cars said coal company sued out a writ
52 of error to said Circuit Court of Appeals, and that said cause was argued on said appeal and writ of error in said Court of Appeals February 17 and 18, 1908, and is still pending in said court and undecided.

(See note *infra*.)

XIV.

Defendant alleges that the adjudication by this honorable court in said case of the Pitcairn Coal Company as to foreign railway fuel cars, and the pendency of that adjudication on appeal, can not be held to operate as *res adjudicata* as against said Rail & River Coal Company, and is no ground for barring or restraining proceedings by this defendant or said Rail & River Coal Company in the case of said Rail & River Coal Company against the complainant herein; that it is well settled that in order to sustain the plea of *res adjudicata:*

First. The subject-matter involved in the adjudication so pleaded must be the same as that in the case in which the plea is set up. (*Lyon v. Perin Manufacturing Co.*, 125 U. S., 700.)

The Pitcairn Coal Company case, while involving the questions raised in the Rail & River Coal Company case, presented other questions not raised in that case; and the Pitcairn Coal Company case related to coal-car distribution by the complainant on the Monongah Division of complainant's system of railroads, while the Rail & River Coal Company case related to coal-car distribution by the complainant on its Newark Division.

Second. The party against whom the plea is set up must have been a party of record to the case in which the prior adjudication was rendered. (*Ib.*)

The Rail & River Coal Company was not a party of record, or in any way a party, to the Pitcairn Coal Company case. No decree could have been entered in that case against the Rail & River Coal

Company, and it could not have appealed from the decree therein. (*Litchfield v. Goodnow,* 123 U. S., 550.)

Third. In order to constitute *res judicata,* the judgment or decree must be final.

In the Pitcairn Coal Company case, the judgment or decree has been suspended pending the appeal to the Circuit Court of Appeals. "A judgment, if appealed from, is not final until the appeal has been determined." (American and English Encyclopedia of Law, vol. 21, p. 266, title "*Res judicata.*")

NOTE.—Since the preparation of this answer, the Circuit Court of Appeals for the Fourth Circuit on September 17, 1908, reversed the ruling of this Honorable Court in the Pitcairn case as to foreign railway fuel cars and sustained in full the ruling of this defendant, holding that, not only foreign fuel railway cars and private cars, but also company cars used by the complainant in transporting its own fuel coal, must be taken into account as part of the coal car equipment to be distributed by the complainant between the coal mines located on its lines and served by it.

In the case of *The Merchants Coal Company v. The Fairmount Coal Company et al.,* this honorable court granted a preliminary injunction restraining said coal company from prosecuting before this defendant a petition against the complainant herein, the said petition before this defendant being a complaint against the system of car distribution of the complainant herein, on the grounds,
53 among others, that said system permitted the use of foreign railway fuel cars and private cars without deducting the same from the percentage allotment chargeable to the mines using the same. This honorable court granted the injunction on the ground that the same questions were involved in and had been passed upon by it in the said case before it of the Pitcairn Coal Company. On appeal, the Circuit Court of Appeals reversed the decree of this court because, as stated in the opinion of said Court of Appeals, The Merchants Coal Company was not a party to the suit in this court and the decree of this court "did not inure to the benefit of any other operator not a party to the suit nor bar an independent suit or proceeding by such operator on its own behalf before the Interstate Commerce Commission to secure similar relief."

XV.

The alleged contracts, referred to in Paragraph VIII of the bill of complaint herein, based, as it is claimed, on the decree of this honorable court in the Pitcairn case and "on the present regulations and practice" of complainant as to foreign railway fuel cars, can have no weight in determining the lawfulness of such regulations or practice. If the withdrawal of the cars from general distribution and their arbitrary assignment to certain favored coal companies is an undue preference or an undue prejudice in violation of the law, no contract can sanction it. The right of parties to make contracts in respect to interstate commerce is subject to regulation under the power given in the commerce clause of the Constitution. The parties

to such contracts are charged with notice of this power, and it enters into and forms a part of such contracts. "Contracts must be understood as made in reference to the possible exercise of the rightful authority of the Government." (*Legal Tender Cases*, 12 Wall., 551.)

XVI.

Defendant alleges that the weight of authority as well as of reason supports the conclusion of defendant as formulated in its order in question, namely, that foreign railway fuel cars and private cars should be taken into account in determining the pro rata share of each mine on general distribution, and that the failure to do so operates an unjust or undue preference on the one hand and subjects to an unjust or undue prejudice on the other hand, within the meaning of section 3 of the act to regulate commerce.

In the cases of the *Chicago & Alton R. R. Co. v. Interstate Commerce Commission* and the *Illinois Central R. R. Co. v. Interstate Commerce Commission*, decided June 29, 1908 (and not yet reported), by the Circuit Court of the United States for the Northern District of Illinois (Circuit Judges Grosscup, Baker, and
54 Kohlsaat), the said ruling of this defendant both as to foreign railway fuel cars and private cars was sustained.

The two cases were heard together and one opinion rendered. In ruling that private cars must be counted the court says:

A charter duty of railroads is to provide cars as well as tracks and locomotives, and so far as the shipping public is concerned it is a matter of indifference whether the railroads discharge this duty by purchasing, by renting, or by borrowing the cars; a shipper who owns cars is not entitled on that account, or on any account, to a preference in rates or promptness in service; and therefore private cars must be treated as constituting a part of the carrier's available commercial equipment.

As to foreign railway fuel cars the court says:

As to cars of foreign railroads, the fact that these railroads are themselves common carriers has nothing to do with the case. They stand as mere consignees of the commodity and in so far as complainants receive upon their roads the fuel cars of foreign railroads, they must count them as part of their own available commercial equipment.

In *Majestic Coal and Coke Co. v. Illinois Central R. R. Co.* (United States Circuit Court, Northern District of Illinois, Eastern Division, not yet reported), a bill was filed by the coal company to *restrain* the railroad company from *including* foreign railway fuel cars and private cars in estimating the coal company's distributive share of coal cars on general distribution. The railroad company demurred to the bill and moved the dissolution of the temporary injunction which had been granted. The court sustained the demurrer and dissolved the injunction, holding that the action of the railroad company in counting or including the said two classes of cars was correct.

The court in its opinion refers to the fact that allotting these cars to the coal company in addition to its pro rata share on general distribution "enables that company to place its coal upon the market

for interstate shipment at a less price than that at which other coal mines can afford to sell coal."

The court further says:

It is the plain intent of the act that railroad companies shall not extend any advantage to any shipper. It follows therefore that any act of a railroad company which directly or indirectly results in the extension of advantage to any one or more shippers dealing with that road in interstate commerce is forbidden by the statute. The defendant may not in any way become a party to the complainant's unfair advantage over other shippers in affording greater facilities to one shipper than to another. It is a creature of the law and amenable to the varying provisions thereof. It was quite within
55 the power of Congress to enact that a railroad shall not lend its great advantages to any enterprise in any way which seems to discriminate against any person dealing with it. That it is doing so in this case is beyond question.

In *Pitcairn Coal Company v. B. & O. R. R. Co.* (154 Fed. Rep., 108), as hereinbefore set forth, this honorable court held, sustaining the position of defendant on this point, that the Pitcairn Coal Company was entitled to have allotted to it its percentage of all the available car supply equipment, whether of general or individual cars; and that said coal company and other coal companies in like situation with it are subjected to an unreasonable disadvantage by getting only a percentage of the Baltimore & Ohio equipment after having first eliminated therefrom the individual cars. In this connection this honorable court said:

These regularly run individual cars occupy the tracks and sidings of the railroad company, are drawn by its locomotives and are operated by its employees, and must lessen the facilities in that respect of the independent operators.

As to foreign railway fuel cars, this court held that not taking them into account in establishing the basis of distribution was not an unreasonable discrimination against the Pitcairn Coal Company, giving as a reason, among others, that "the coal shipped in such foreign fuel cars is not counted as part of the shipments of the mine in arriving at its percentage *rating*."

We respectfully suggest, however, that these foreign railway fuel cars, to the same extent as private cars, "occupy the tracks and sidings of the railroad company, are drawn by its locomotives and are operated by its employees, and must lessen the facilities in that respect of the independent operators."

See note *infra*.

In *Logan Coal Company v. Pennsylvania Railroad Company* (154 Fed. Rep., 497) the United States Circuit Court for the Eastern District of Pennsylvania held that an order of the railroad company providing that foreign railway fuel cars and private cars "be charged against the capacity" of the mines at which they are placed was not objectionable. The court says, in its opinion:

The general trend of the decisions is to the effect that all cars, whether individual cars or owned by the railroad company, or as-

signed by other railroad companies for fuel, shall be treated as an available car equipment as a whole, distributable pro rata to shippers desiring their use along the line upon a basis giving each equal facilities with the other.

NOTE.—Since the preparation of this answer, the Circuit Court of Appeals for the Fourth Circuit on September 17, 1908, reversed the ruling of this Honorable Court in the Pitcairn case as to foreign railway fuel cars and sustained in full the ruling of this defendant, holding that, not only foreign fuel railway cars and private cars, but also company cars used by the complainant in transporting its own fuel coal, must be taken into account as part of the coal car equipment to be distributed by the complainant between the coal mines located on its lines and served by it.

The court cites the following as some of the cases in which these questions have been considered: *U. S. ex rel. Coffman v. Norfolk & Western Ry. Co.* (C. C.), 109 Fed. Rep., 831; *U. S. ex rel. Kingwood Coal Co. v. W. Va. & Northern R. R. Co. et al.* (C. C.), 125
56 Fed. Rep., 252; *W. Va. & Northern R. R. Co. et al. v. U. S. ex rel. Kingwood Coal Co.*, 134 Fed. Rep., 198, 67 C. C. A., 220; *U. S. ex rel. Greenbrier Coal & Coke Co. v. Norfolk & Western Ry. Co.*, 143 Fed. Rep., 266, 74 C. C. A., 404; *State ex rel. v. C., N. O. & T. P. Ry. Co.*, 47 Ohio St., 130, 23 N. E., 928; *U. S. ex rel Pitcairn Coal Co. v. B. & O. R. R. Co. et al.*, 154 Fed. Rep., 108.

XVII.

It is well settled that, in the language of the authorities, "an injunction, being the strong arm of equity, should never be granted except in a clear case of irreparable injury and with the full conviction on the part of the court of its urgent necessity." It is not shown in the bill of complaint herein that there is an urgent necessity for a temporary restraining order or injunction in this case or that irreparable injury will result from allowing the order in question to go into operation. The allegation in said bill that there will be, if said order is not suspended or enjoined, a multiplicity of suits against complainant for penalties under section 16 of the act to regulate commerce, is mere supposition or conjecture, and it is wholly improbable that such suits will be instituted by the United States as provided in said section 16 prior to a final adjudication as to the lawfulness of defendant's order, and said allegation is not sufficient to justify the issuance of a restraining order or injunction. The Pennsylvania Railroad Company and other companies are, and for a long period of time have been, distributing their coal cars among the mines located on their lines in accordance with the rules laid down in said order—that is, counting foreign railway fuel cars and private cars in determining the pro rata to which each mine is entitled on general distribution—and no irreparable or other injury appears to have resulted to said companies therefrom.

XVIII.

On the other hand, defendant alleges that injury has resulted, and is resulting, from the complainant's unfair and discriminatory system of coal car distribution, not only to the Rail & River Coal Company and other coal companies on its lines who are the victims of said system, but also to the *general public,* who are vitally interested in the speedy and efficient distribution of coal from all the mines which are served by complainant, and that such injury, not being susceptible of accurate ascertainment or computation, is irreparable. The order of this defendant should therefore be made effective at as early a date as possible, and the speedy enforcement thereof is the more urgent because the period of coal car shortage, covering the fall and winter months, will soon commence if it has not already commenced.

57 Defendant is informed and believes, and so states, that the extent of the coal car shortage and the injury resulting therefrom to the Rail & River Coal Company are apparent from the fact that from August, 1906, to November, 1907, said company only made shipments of coal to one-fourth of its capacity, on account of not receiving a sufficient supply of cars; and the further fact that said company could have produced its coal at 75 cents per ton if its car supply had been sufficient to enable it to operate its mine to the extent of its full capacity, but the average cost to said company, on account of car shortage, was 95 cents per ton; and the further fact that defendant could not make contracts for future delivery of coal because the car supply could not be relied upon.

XIX.

This defendant denies all the material allegations of said bill of complaint inconsistent with the allegations set forth in the foregoing paragraphs of this answer from Paragraph I to Paragraph XVII thereof, both inclusive; and now, having answered said bill of complaint in so far as it is advised the same is material and necessary to be answered, denies that the complainant therein, the Baltimore & Ohio Railroad Company, is entitled to the relief, or any part thereof, in said bill of complaint demanded, or any relief whatsoever, prays the same advantage of its answer therein as if it had demurred to said bill of complaint, and prays to be hence dismissed with its reasonable charges in this behalf wrongfully sustained.

THE INTERSTATE COMMERCE COMMISSION,
By EDWARD A. MOSELEY,
The Secretary Thereof, Thereunto Duly Authorized.

L. A. SHAVER, *Solicitor.*

58 & 59 WASHINGTON,
District of Columbia, ss:

I, Edward A. Moseley, secretary of the Interstate Commerce Commission, having read the foregoing answer from Paragraph I to Paragraph XVIII thereof, both inclusive, and knowing the contents

thereof, hereby make oath that the matters of fact therein stated are true to the best of my knowledge, information, and belief.

EDWARD A. MOSELEY,
Secretary of the Interstate Commerce Commission.

Subscribed and sworn to before me, H. S. Milstead, a notary public in and for said District of Columbia this the —— day of September, 1908.

[SEAL.] H. S. MILSTEAD,
[Seal of Notary.] *Notary Public.*

60 & 61 EXHIBIT A.

62 Before the Interstate Commerce Commission.

RAIL & RIVER COAL COMPANY
v.
BALTIMORE & OHIO RAILROAD COMPANY.

The petition of the above-named complainant respectfully shows:

I.

That the complainant the Rail & River Coal Company is a body corporate under the laws of the State of West Virginia, and its address and place of business is Bellaire, Ohio.

II.

That defendant above named is a common carrier engaged in the transportation of passengers and property by a line of railway owned and leased by it between the city of Baltimore, in the State of Maryland, through the States of Maryland and West Virginia to Grafton, W. Va.; from Grafton, W. Va., through the States of Ohio, Indiana, and Illinois to the city of Chicago, Ill.; and from Grafton, W. Va., to the city of Pittsburg, Pa. Defendant issues through bills of lading and makes through rates of freight on shipments from points in the several States through which its said railroad runs to points in many other States, and receives and transports such shipments under through bills of lading and through rates of freight from points in many States to points upon its lines of railway in the several States through which the same run, and thereby as such common carrier is subject to the provision of the act to regulate commerce, approved February 4, 1887, and the acts amendatory thereof and supplemental thereto. The coal mine of complainant hereinafter referred to is located upon the Newark division of the defendant, which runs from Grafton, in the State of West Virginia, to Newark, in the State of Ohio.

III.

That complainant owns about 14,000 acres of coal lands in Belmont County, Ohio, upon which is located a coal mine on the line

of defendant's railroad, which mine is equipped with mining machinery, haulage appliances, and tipple facilities for the
63 mining, production, and loading of coal, with a side track from the defendant's main line constructed to and under the tipple at defendant's mine, so that coal mined and produced at said mine may be loaded from said tipple upon cars placed on said side track from defendant's main line. Said coal land and mine were acquired by complainant from The Empire Coal Mining Company, which owned and operated said mine for a period of several years prior to its acquisition by complainant. Complainant has shipped and does ship the coal produced at said mine to points within and without the State of Ohio. Complainant has in and at said mine working places, mine cars of sufficient capacity, switch and tipple efficiency, a sufficient number of mining machines of the proper character, haulage system and power operating the same, can employ a sufficient number of miners and other employees, and has mine openings and miners' houses, to produce from said mine 1,200 tons of coal for each working day of eight hours.

IV.

That defendant unjustly and unduly discriminates against complainant and other owners and operators of coal mines in the several coal-producing districts on its lines of railway, engaged in shipping coal to points in different States in this, to wit: That while defendant distributes the cars distributed by it to the coal operators upon its lines of railway in said several districts upon ratings by it made as to the capacity of the several mines to produce coal, it does not in arriving at such ratings consider the working places, the number of mine cars and their capacity, the switch and tipple efficiency, the number and character of the mining machines in use, the haulage system and power used to operate the same, the number of miners and other employees about such mines, the mine openings and miners' houses in, at, and about the respective mines upon its lines of railway, and which should be considered by the defendant in determining the coal-producing capacities of such mines as the basis upon which the defendant should distribute cars in which to ship coal from said mines. Defendant does not in arriving at the ratings of the mines on its lines of railway and upon which its distribution of coal cars is made consider the elements heretofore set forth, which determine the capacities of such mines to produce coal, nor does it determine such capacities by the physical conditions in, at, and about such mines, which are the factors in determining the amounts of coal which such mines can severally produce.

V.

That defendant unjustly and unduly discriminates against complainant and other owners and operators of coal mines along
64 its lines of railway engaged in shipping coal to points in different States in this, to wit: That while defendant from day to day distributes its cars to be loaded with coal from mines along its line of railway, by some method by it established, accord-

ing to ratings established by it as to the several and respective capacities of such mines, it does not in such distribution consider certain so-called "foreign railway fuel cars," claimed to be consigned by other railroads to certain mines upon the lines of defendant's railway and used in the transportation of coal to points in different States, but delivers such "foreign railway fuel cars" to such mines without charging the same against the percentages or distributive shares of cars to which such mines might be entitled under the aforesaid distribution, while at the same time furnishing to such mines the full distributive shares of cars which the defendant allows to them under its method of distributing cars upon the ratings established by defendant for such mines.

VI.

That defendant unjustly and unduly discriminates against complainant and other owners and operators of coal mines upon its lines of railway engaged in shipping coal to points in different States in this, to wit: That as to certain so-called "private" cars, owned or claimed to be owned by owners or operators of coal mines upon the lines of defendant's railway, and as to certain so-called "private" cars, owned or claimed to be owned by consignees and furnished by such consignees to the operators of coal mines on the lines of defendant's railway, the defendant does not consider said so-called "private" cars in its general distribution of cars under the method of distribution of cars in use by it; does not charge said cars against the percentages in such distribution to which the owners of such coal mines may be entitled or deduct the same from the distributive shares of cars to which such owners and operators of coal companies may be entitled, but, on the contrary, arbitrarily furnishes said cars and hauls the same for and on behalf of the parties owning or claiming to own such cars or on behalf of the owners or operators of coal mines on the lines of defendant's railway in addition to the cars to which such owners or operators of coal mines are properly entitled in the general distribution of cars by defendant.

VII.

That defendant unjustly and unduly discriminates against complainant and other owners and operators of coal mines along its lines of railway engaged in shipping coal to points in different States in this, to wit: That defendant furnishes to certain operators of coal mines along its lines of railway (the names of such operators being unknown to complainant) certain cars to be loaded with coal by the operators of such mines, upon terms unknown to complainant, but defendant does not, in its general distribution of cars to be loaded with coal from mines along its lines of railway, consider the cars so furnished to the operators of such mines, but delivers such cars to the operators of such mines arbitrarily and hauls them without charging the same against the percentages or distributive shares of cars to which such operators might be entitled under the general distribution of defendant's available cars, and at the same time furnishes to such operators their full dis-

tributive shares of cars which the defendant allows to them under its method of distributing cars.

VIII.

That defendant unjustly and unduly discriminates against complainant and other owners and operators of coal mines in the several coal-producing districts upon its lines of railway engaged in shipping coal to points in different States in this, to wit: Defendant does not distribute its aggregate available coal-car equipment among the several coal-producing districts upon its lines of railway according to the total capacities of the mines in each of such districts, respectively, by ratings established as set forth in paragraph IV hereof, but on the contrary distributes such aggregate coal-car equipment among such districts arbitrarily and without any rule or method.

IX.

That defendant unjustly and unduly discriminates against complainant and other owners and operators of coal mines along its lines of railway engaged in shipping coal to points in different States in this, to wit: That where an owner or operator of coal mines owns and operates more than one mine upon the lines of defendant's railway defendant does not require in its general distribution of coal cars to the mines in the respective districts that the distributive share of each mine in such distribution shall go to the mine entitled thereto, but permits such owner or operator having more than one mine to have the distributive shares of one or more of such mines delivered at other of the mines so owned by such owner or operator.

Wherefore plaintiff says that defendant may be required to answer the charges herein, and that after due hearing and investigation an order be made commanding the defendant to cease and desist from the violations of the act to regulate commerce referred to and set forth in paragraphs IV, V, VI, VII, VIII, and IX herein; that it be determined herein what shall be the proper method of rating the mines on the lines of defendant's railway and upon which
66 & 67 defendant shall make its distribution of cars to such mines; that it be determined herein what shall be the proper method of distribution by defendant of foreign railway fuel cars, private cars, and arbitrary cars, and the manner in which the same shall be deducted from the distributive shares of cars to which the mines receiving the same may be entitled; that the defendant be ordered to hereafter deduct said foreign railway fuel cars, private cars, and arbitrary cars from the distributive shares of cars which the mines receiving them may be entitled under the general distribution by defendant; that defendant be ordered to desist from the practice of permitting cars to which any mine is entitled in the general distribution by defendant from being used and loaded at other mines belonging to the same owner; and for such other and further order as the Commission may deem necessary in the premises.

Dated at Bellaire, Ohio, this 4th day of November, 1907.

RAIL AND RIVER COAL COMPANY,
By H. A. KUHN, *President.*

68 EXHIBIT B.

69 No. 1322.

RAIL & RIVER COAL COMPANY
v.
BALTIMORE & OHIO RAILROAD COMPANY.

Submitted April 11, 1908; Decided June 2, 1908.

1. The Commission has jurisdiction of complaints involving the practices and regulations of interstate carriers in respect to the distribution of coal cars. Section 15 of the act is to be read in the widest possible sense; it brings within the jurisdiction of the Commission all the regulations and practices of carriers under which they offer their services to the shipping public, and conduct their transportation.
2. Any regulation or practice that withdraws from a shipper the equal opportunity of taking advantage of the rates offered by a carrier is a regulation or practice "affecting rates," within the meaning of that phrase as used in section 15.
3. The principles announced in *Railroad Commission of Ohio v. Hocking Valley Ry. Co.*, 12 I. C. C. Rep., 398, in regard to the distribution of private coal cars and foreign railway fuel cars, adhered to and reaffirmed with a reference to the obvious relation between a shortage in cars and an insufficiency of motive power, sidings, train crews, and other facilities which usually accompany a car shortage.
4. As a mere matter of law and in the absence of a definite showing based on actual experience a system of rating mines that takes into consideration both physical and commercial capacity can not be said to be discriminatory and unlawful. A rule permitting the owner of several mines to "pool" or group all his percentage cars at one of them can not be condemned as unlawful merely on hypothetical grounds unsupported by proof of discriminatory results.

H. B. Arnold for complainant.
Hugh L. Bond, Jr., John G. Wilson, W. A. Parker, and *F. A. Durban* for defendant.

Report of the Commission.

HARLAN, *Commissioner:*

A preliminary question of jurisdiction must first be disposed of before the other questions of fact and law presented by this record may properly be considered. The complainant alleges that the operation of the defendant's rules and regulations governing the distribution of coal cars among the various coal mining dis-
70 tricts on its lines results in giving to some of the districts a less than a just proportion of available cars; and that, as

applied to the distribution of cars allotted to the particular district in which the complainant is mining coal, the rules and regulations give an undue preference to some of the operators in that district and create an unlawful discrimination against others. The complainant therefore prays that these regulations and practices may be declared to be unlawful and that the defendant may be required by appropriate order to adopt a plan that will yield more equitable results. In its answer the defendant, while denying any inequality and unfairness in the distribution, raises the jurisdictional question by pleading that such matters are not within the scope of the regulative authority of the Commission.

The point arises upon the first paragraph of section 15 of the amended act to regulate commerce. Stripping the clause of unnecessary words and eliminating from it all matter not essential to this inquiry, the language upon which the argument of the defendant is based will stand out more clearly and the question will more readily be apprehended. The clause will then read as follows:

That the Commission is authorized and empowered, and it shall be its duty, whenever, after full hearing upon a complaint made * * * it shall be of the opinion that any of the rates * * * demanded * * * by any common carrier * * * for the transportation of persons or property * * * *or that any regulations or practices whatsoever of such carrier or carriers affecting such rates,* are unjust or unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this act, to determine and prescribe what will be the just and reasonable rate * * * thereafter * * * to be charged; *and what regulation or practice in respect to such transportation is just, fair, and reasonable to be thereafter followed;* and to make an order that the carrier shall cease and desist from such violation * * * and shall conform to the regulation or practice so prescribed.

The contention of the defendant is that its regulations and practices with respect to the distribution of coal cars among the various mines on its lines are not regulations or practices "affecting rates," and it therefore denies the authority of the Commission to intervene between it and its coal shippers with a view to controlling and reforming the manner in which the distribution is made. Its counsel says:

The law confers no power to make any order with reference to any regulation or practice of the carrier not affecting rates. Regulations as to car distribution do not affect rates, and the Commission has, therefore, no power to prescribe what regulation or practice shall be followed with regard thereto.

The point is not altogether a new one. It has been pleaded in other cases although not seriously insisted upon in argument.
71 But in this proceeding it is earnestly urged upon our attention by the defendant as decisive of the controversy and of the right of the Commission to enter an order. The question is one of very large importance. If the numerous and varied regulations and practices of carriers which enter so vitally into questions

of transportation do not "affect rates," in the sense attributed by counsel for the defendant to that phrase, and therefore lie outside the jurisdiction of the Commission, our power to protect the shipping public against abuses is much less extensive than has generally been understood. There is no more insidious or effective way by which a carrier may discriminate between its shippers than through a regulation or practice that denies to them the equal enjoyment of its facilities. And if the rules of carriers with respect to car distribution are not included within the scope of the law, the prosperity of shippers, during periods of car shortage, largely lies in the hands of the carriers on whose lines they conduct their business enterprises, whenever such carriers are disposed to and do actually favor some shippers at the expense of others. By giving to one manufacturer a larger proportion of cars than he is entitled to, when the volume of his traffic is compared with that of a competitor, his business may be encouraged and built up, while the business of the competitor may be destroyed, if the Commission has no authority to intervene on his behalf. That there is need of such authority will appear from an examination of the published reports of proceedings in which the Commission has found just occasion to exercise it.

The power upon complaint made to deal with unjust, preferential, and discriminatory regulations and practices of carriers was clearly vested in the Commission under section 15 of the act as it stood prior to the amendatory act of June 29, 1906. Whether or not it still exists under section 15 of the amended act must be ascertained by examining the whole act as it now stands with a view to gathering the general intent and purpose of the enactment, and then by examining the various provisions by which the intent and purpose are sought to be made effective. The underlying purpose of this legislation, as will doubtless be agreed, was to put shippers on a basis of absolute equality; to assure to them not only equal rates but an impartial enjoyment of the facilities and services of interstate carriers. That principle appears throughout the act, but nowhere more clearly than in sections 2 and 3. The former assures to shippers an equality of rates for the transportation of property under substantially similar circumstances and conditions; and the latter assures to them an equality in the opportunity to use the rates, facilities, and services of carriers. One right supplements the other. An equality in rates without an equal opportunity
72 to use the facilities of carriers would fall far short of the general objects sought to be accomplished by the Congress. On the other hand, the right to impartial treatment by carriers in the transportation of their merchandise would mean little to shippers if not accompanied by an assurance of an equality also in rates. And when we approach the consideration of any special provision in the act, this understanding of its general scope and purpose must not be lost sight of. As was said by Chief Justice Marshall in *The Durousseau v. United States*, 6 Cranch, 307, 314:

The spirit as well as the letter of a statute must be respected, and where the whole context of the law demonstrates a particular intent

in the legislature to effect a certain object, some degree of implication may be called in to aid that intent.

But, while keeping in mind the general intent and spirit of the act, we are by no means to be understood as indicating that our power to deal with undue preferences and unlawful discriminations, when accomplished by carriers through unjust regulations and practices, rests upon implication; or that it is necessary by implication to inject into section 15 explanatory words that are not embraced within its text. The language of that provision is entirely sufficient in itself to enable the Commission to redress wrongs of the character complained of in this proceeding. In reaching this conclusion we are not required to resort to ingenuity in construction or to rest the argument upon a mere matter of punctuation as suggested by counsel. In our view any practice or regulation that unlawfully discriminates against one shipper and affords an undue preference to another shipper is a regulation or practice affecting rates within the meaning of that phrase as used in the clause in question. Any regulation or practice that withdraws from a shipper the equal opportunity of using and taking advantage of the rates offered by a carrier to the public is clearly a regulation or practice affecting rates in the sense in which that phrase is used in the amended act at the point in question. To hold otherwise, as the defendant urges, would be to put the narrowest possible construction upon those words, in disregard of the general objects and purposes of the enactment. And this we are not warranted in doing under any recognized rule of statutory construction, and more especially when a remedial statute is under consideration. After having vested in the Commission the power to redress wrongs arising out of unreasonable and unjust rates, we are not ready to accept the view that the Congress has contented itself with a mere admonition in the law against the great wrongs that may be done against shippers through unjust regulations and practices. That as counsel contends is exactly what has happened. Although Congress has declared such practices to be unlawful, counsel insists that it has omitted to give us the power to correct
73 them. Setting aside as beyond the reach of the Commission the great body of rules, regulations, and practices of carriers that have to do with transportation, he says:

Examples of regulations affecting rates are those fixing maximum and minimum carload weights, and that contained in the fourth clause of the uniform bill of lading which provides that all property transported shall be subject to necessary cooperage and baling at the owner's cost.

The maximum or minimum weight of a carload is not something affecting the rate, but is in fact a part of the rate, a factor which is just as essential to a correct statement of the rate as is the rate per 100 pounds itself. Nor do cooperage and baling affect the rate as such. They are simply special services performed by the carrier in transit when it is necessary to protect the shipment from damage or loss. Such services neither increase nor diminish the rate, but are charges entirely apart from the rate. While no other examples of rules or practices affecting rates are vouchsafed us by counsel to illus-

trate his conception of the meaning of that phrase, apparently he construes it as referring to rules or practices which in some way increase or diminish the amount of freight charges that the shipper must pay on a shipment.

The text itself does not justify that construction of the provision in question. It will be observed that the clause divides itself naturally into two parts; it authorizes the Commission, first, to consider the wrong alleged, and then to apply the remedy. If it shall be of the opinion after a full hearing that the regulation or practice complained of is unreasonable and unjust, the Commission may remedy the wrong by prescribing a just and reasonable regulation or practice thereafter to be followed by the carrier. In the first part of the provision reference is made to regulations or practices "affecting rates;" the remedy offered by the provision consists in the prescribing by the Commission of a just and reasonable regulation or practice with respect to "transportation." While there is here some contradiction in the words used, we do not understand that there is any contradiction in the real substance of the clause or in its meaning. Each part of the clause has a necessary relation to the other part, and the words "regulations" and "practices" as used in both parts must necessarily be used in the same sense. If they are not so used it is difficult to see how a wrongful regulation or practice "affecting rates," in the sense of affecting the amount of the freight charges on a shipment, could ordinarily be cured by the substitution, as the clause now under consideration provides, of a just or reasonable regulation or practice in respect to "transportation." Obviously the two phrases refer to the same kind of regulations and practices, namely, the regu-
74 lations and practices under which the transportation of interstate carriers is conducted. When both phrases are considered together and the whole clause is read in the light of the great purposes underlying the act, there is little difficulty in reaching the conclusion that the words "any regulations or practices whatsoever * * * affecting such rates" are used synonymously with the words "regulation or practice in respect to such transportation;" and that both clauses are to be read in the widest possible sense and embrace all regulations and practices of carriers under which they offer their services to the shipping public and conduct their transportation. We find no difficulty in holding, under section 15 of the amended act, that ample authority is vested in the Commission to deal with the undue preferences and unlawful discriminations forbidden under sections 2 and 3 and elsewhere in the act, regardless of the form of the rule, regulation, or practice under which such wrongs may be perpetrated.

Having disposed of the defendant's contention with respect to the question of jurisdiction, we come now to a consideration of the merits of the controversy. The first complaint made of the defendant's rules regulating the distribution of coal cars is that they do not provide that private cars belonging to individual operators shall be charged against their respective percentages, but permit them to be received by the individual mines in addition to the system cars which they are respectively entitled to in the general distribution. The same com-

plaint is made with respect to what are ordinarily referred to as foreign railway fuel cars that are sent into the mining districts on the lines of the defendant by connecting lines, and are billed or manifested to particular mines with which the connecting carrier has made arrangements for securing the coal required for its own use. Under the defendant's rules these cars are delivered to the operator to whom they are consigned or manifested, without being charged against his percentage in the general distribution. And these practices the complainants insist are discriminatory in their results and therefore unlawful. These questions have been presented and elaborately argued before the Commission in other proceedings, and have had exhaustive and careful consideration. They will not, therefore, be further considered in connection with this complaint. It will suffice to say, in accordance with the announcement made in *Railroad Commission of Ohio v. Hocking Valley Ry. Co.*, 12 I. C. C. Rep., 398, that the view of the Commission is that the practice of the defendant in not charging private or individual cars against the percentages of the operators receiving them is unlawful and that such operators are not entitled in the general distribution of available cars to receive their respective proportions of the system cars in addition to their private cars. A like ruling must be made with respect to foreign rail-
75 way fuel cars. As to the cars used by the defendant to secure its own supply of railway fuel no point is made in the complaint and no discussion was had on the argument. We shall therefore take no action with respect to such equipment. The principle clearly announced in the case referred to, both with respect to the so-called private cars and the so-called foreign railway fuel cars, is that while a carrier, during percentage periods, may not assign the private cars to operators other than their owners, and may not assign foreign railway fuel cars to any mines except those to which they have been manifested by the foreign line, it must nevertheless count all such cars against the distributive share of the respective mines to which the private cars belong or the foreign railway fuel cars have been consigned; and in case the private cars or foreign railway fuel cars so delivered to a mine do not fill out its distributive share of available cars, enough system cars are to be added to make up its share according to its rating. And that principle must control the defendant's course in the future with respect to such cars. It may be well, however, at this time to say for the general information of those interested in such matters that in this proceeding, as well as in other proceedings that have come before the Commission, too little stress has been laid upon the very obvious relation between a shortage in cars and an insufficiency in motive power, in sidings, in tracks, in train crews, and other facilities necessary to the movement of traffic. A shortage of cars on a particular line does not mean that the supply of cars of that carrier has been diminished in number, but only that the volume of traffic offered exceeds the capacity of its available equipment to move it. A shortage in cars usually, if not invariably, is accompanied by a shortage in some one or more of the other facilities of the carrier. When it has not enough coal cars, it usually has not enough locomotives and other facilities to meet the demands

of its coal shippers. That was the case in the *Hocking Valley case, supra*, and in this record sufficient testimony of that tenor appears to lend support to the disposition here made of that portion of the complaint. But this element in a shortage situation must not be overlooked by litigants who complain of the methods of carriers in the distribution of their equipment. Its importance is very clear. The mere ownership of a private car gives to the owner no superior right to use the facilities of the carrier in transporting it; it gives to him no right to have his private car attached to a locomotive in preference to a system car loaded by another shipper. The ownership of a private coal car or the possession of a foreign railway fuel car can give to an operator no preferred right to have it occupy a carrier's sidings or other tracks as against a system car loaded by another coal operator, or to have it handled by a train crew in preference to a system car. When any of these general facili-
76 ties are insufficient to move all the traffic offered, no operator has a superior right over another merely because he enjoys the advantage of owning private cars or has fuel contracts with connecting lines. And this shortage in other facilities which, as heretofore stated, rarely, if ever, fails to accompany a shortage in cars, has an important bearing upon the matter of the distribution of cars, and underlies what the Commission has said on those questions in its formal decisions.

In support of the allegation that system cars are arbitrarily allotted to certain operators without regard to their percentage rating, the complainant's proof was very meager. The right of a carrier to make such arbitrary allowances for the purpose of enabling the owner of a mine reasonably to develop it, so as to put it in a condition to operate and make shipments, has been recognized, and we see no grounds for disturbing the right in this case. But any arbitrary allowance of cars made to an operator on other grounds should be closely scrutinized, and is an unlawful discrimination unless justified by special conditions. Without going into the details of the record in this connection, it will suffice to say that the defendant must adjust its practices in that respect in accordance with these well-defined principles. We shall expect no less of it with respect to the allegation that there has been discrimination in the distribution of cars between the several mining districts on its lines. There is very little specific testimony in the record to support this contention, but enough appears to suggest that the matter should be carefully reexamined by the defendant with a view to a more perfect apportionment of its equipment between the several districts. A fixed rule governing the distribution of cars among various districts presents a difficult problem. But we do not regard it as a difficult matter to arrive at some method that will have due regard to transportation conditions and at the same time will produce reasonably equitable results. On both these questions we shall make no order for the present, the record, as we understand it, not disclosing a sufficient basis for definite action.

The matter most discussed on the hearing as well as upon the argument was the method adopted by the defendant in rating mines for the purpose of establishing the percentage of available car equip-

ment to which they are respectively entitled in the daily distribution of cars during those periods when the demand for coal cars exceeds the supply. In this respect the basis of distribution long in force on the lines of the defendant differs from that adopted by other carriers whose methods for distributing cars have come before us upon formal complaint. In 1902 the defendant established a percentage basis consisting of two principal factors, (*a*) the physical capacity of the mine, and (*b*) the commercial capacity. The
77 physical capacity is determined by the thickness of the coal seam, the number of rooms or working places, the capacity of the underground tram tracks, and the facilities for getting the coal out of the mine into the tipple, and from the tipple into the cars. A fixed per diem value is assigned to a man's labor, taking into consideration the character of the seam upon which the work is to be done; and the number of places in which a man can work is taken into account regardless of the number of men actually employed. This in substance is the method generally adopted in arriving at the physical capacity of mines. But the defendant takes into consideration also what is referred to in the record as the commercial capacity of the mine, that is to say, the actual requirements of a mine for cars as tested by actual shipments made by the mine. This factor is arrived at by taking the volume of shipments made by the mine during a period of free car supply, usually of four months and generally from April 1 to August 1, in each of the two preceding years. In figuring the actual shipments made by a mine during these two free car periods, all its shipments are included except the shipments of fuel coal to the defendant company. These three factors, namely, the physical capacity, the commercial capacity for the first year, and the commercial capacity for the second year, are added together and divided by three. The result is the capacity basis for determining the percentage of available cars that a particular mine is entitled to receive during percentage periods.

This method of rating mines was adopted by the defendant in 1902, after a careful examination of the various systems in force on other lines. It was intended as a compromise between ratings based on physical capacity only and ratings based on commercial capacity only. The physical capacity basis is already well understood. The objection found by the defendant in that system was much like the defect condemned by the Commission in *Powhatan Coal & Coke Co. v. Norfolk & Western Ry. Co.*, 13 I. C. C. Rep., 69. In that case it appeared that the percentage rating of mines on the Norfolk & Western was based upon the number of coke ovens that had been erected by the respective operators. Many of the mines had erected coke ovens largely in excess of their requirements and solely for the purpose of increasing their percentages. The record showed that in the whole district but 52 per cent of the ovens that had been built were in actual operation. The ruling of the Commission was that the mere number of ovens erected by a particular mine did not fairly measure its relative rights in the distribution of cars. In an examination of the situation on its lines, the defendant observed a like tendency. For the purpose of increasing their car percentage,

the operators were developing the physical capacity of their
78 mines beyond their actual selling capacity. This was an economic waste for which the system adopted by the defendant was intended as a partial cure. Ratings based upon commercial capacity only are used on some lines and are built up on what is called the "surprise" test. Without previous notice a carrier for three or four days will supply a mine with all the cars that it can use, and in this way a test is made of its actual requirements. The defect in this system was that in some way the mine owner would learn that a test was about to be made and could thus prepare for it. The system in force on the lines of the defendant combines these two theories of distribution. By taking the physical capacity as one factor and as the other factor the commercial capacity, tested not during a period of three or four days only, but during the substantial period of four months in each of two years when cars are abundant and can be supplied in sufficient numbers to meet all the requirements of the mines, it was thought by the defendant that a more equitable distribution would result. Manifestly a mine having a small physical capacity, but which has secured large contracts, would prefer a system based on commercial capacity only. On the other hand an operator of a mine having a large physical capacity, but which has no large contracts, would prefer a system based upon physical capacity only. In combining the two systems the defendant has adopted a middle ground, apparently upon the thought that neither the physical nor the commercial capacity is always a fair test. We are not prepared on this record to say that there is no force in that view, and that a system of mine rating based upon a combination of the physical and commercial capacities of the several mines does not more closely approximate the actual car requirements of the mines than a system based upon physical capacity only.

But it is insisted by the complainant that the mine receiving foreign railway fuel cars and private cars during the free car periods is thereby able to increase its percentage rating as compared with the operator who receives no foreign fuel or private cars. It is urged that the operator who happens to have contracts for delivering coal during the free car periods, or whose sales are increased during those periods because of personal connections with coal dealers and consumers, is given an undue advantage when, in addition to the physical capacity, the actual shipments for the two preceding years are added for the purpose of arriving at his percentage basis; and that the method of rating mines by taking into consideration the previous shipments not only results in increasing the percentage of certain operators but ultimately results in increasing the actual physical capacities of such mines. It may be that this is true. But is the
defendant's system of car distribution on that account neces-
79 sarily unlawful? It is not unlawful for coal operators to have contracts to supply connecting railway lines and private industries; and it does not follow because a large operator has large contracts that he is getting an undue or unlawful advantage under this system of car distribution over smaller operators in the same dis-

trict. While the operator with large contracts may be able to keep his mine running more constantly and at a lower cost per ton, and may develop it more rapidly and thus in the progress of time be able to enlarge its percentage in the car distribution, nevertheless if that opportunity be open under the defendant's rules and regulations to all operators we do not clearly see on what ground the system must be condemned. Certainly the record does not advise us of any specific instances of discriminatory results to the smaller operators arising out of the defendant's system. The attack upon it is based largely upon the mere opinions of a few operators who testified that the system was unfair to operators having no contracts. As the record now stands the Commission is asked to hold, as a matter of law rather than as a fact demonstrated by actual experience, that the defendant's method of rating mines is unduly discriminatory, and that the only proper and lawful basis for the distribution of coal cars among the mines of a coal district is their respective and relative physical capacities.

Neither this record nor the records in other proceedings and investigations relating to coal-car distribution justify us in holding as a fixed rule of law that the physical capacity of the several coal mines in a given district is the only lawful factor upon which a system of car distribution may be built up, and that their actual requirements or commercial capacity may not lawfully be considered in the distribution. As at present advised the Commission is not in possession of sufficient information upon which to base such an announcement for general application. It seems to be rationally and logically a question of fact to be determined according to the circumstances and conditions existing in each particular case. When examined from that point of view no such showing is to be found in this record as will enable us properly to enter an order sustaining the complaint in that respect. The present system of rating mines has been in effect on the lines of the defendant for some years. Apparently it is satisfactory to the great body of the coal operators served by the defendant; out of the 340 mines on its lines operated by about 200 different companies, only three or four operators are shown by the record to be of the opinion that the percentage basis works unfairly and disadvantageously. Upon such a showing we are unwilling to disturb the situation and see no just grounds for doing so. But we base this view on the record only and are not to be understood as closing
80 & 81 the question to further consideration. All we desire to be understood as saying at this time is that a method of mine rating that is apparently satisfactory to the great body of coal operators on a carrier's line ought not to be disturbed except upon a stronger showing than is here made.

Finally complaint is made of what is called "pooled percentages." The defendant permits the car percentages of several mines controlled or operated by one company to be grouped or pooled upon one or more of the mines; that is to say, if a company owning and operating four openings is entitled in the daily distribution to 25 cars for each mine it may group or pool all these cars or any portion of them at one mine instead of using them at each mine in accordance with their

respective percentages. This practice is complained of as an unjust discrimination on the ground that it permits a mining company rapidly to develop one mine after another and thereby to increase the percentage ratings of the several mines; and also that it enables a mining company to operate one or more of its several mines to a larger daily capacity and thereby reduces the cost per ton of the coal produced. Here also the record is lacking in sufficient facts and leaves us to a consideration of this complaint as a hypothetical one and as a question of law. Without committing ourselves at this time to any final opinion on the question, it will suffice to say that no sufficient showing has been made to enable us to say that this practice is unlawful and results in fact in undue and unlawful discriminations.

An order will be entered to give effect to these views.

82 *Order.*

At a General Session of the Interstate Commerce Commission, Held at its Office in Washington, D. C., on the 2nd Day of June, A. D. 1908.

Present: Martin A. Knapp, Judson C. Clements, Charles A. Prouty, Francis M. Cockrell, Franklin K. Lane, Edgar E. Clark, James S. Harlan, Commissioners.

No. 1322.

RAIL & RIVER COAL COMPANY
v.
BALTIMORE & OHIO RAILROAD COMPANY.

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its conclusions thereon:

It is ordered, That the defendant, the Baltimore & Ohio Railroad Company, be, and it is hereby, notified and required, on or before the 1st day of August, 1908, to cease and desist, and during a period of at least two years thereafter to abstain, from maintaining and enforcing, with respect to interstate shipments of coal, the present practice or regulation of failing or refusing, in times of coal car shortage, to count railway fuel cars and leased or so-called private coal cars against the distributive shares of available system coal cars which the coal operators, to whom said leased or so-called private coal cars belong or said foreign railway fuel cars are consigned, are entitled to according to the ratings of their respective mines.

It is further ordered, That said defendant be, and it is hereby, notified and required to establish, on or before said 1st day of August, 1908, and during a period of at least two years thereafter to

83 maintain and enforce, with respect to interstate shipments of coal, a practice or regulation which, in times of coal-car shortage, shall require foreign railway fuel cars and leased or so-called private cars to be counted against the distributive shares of available

cars to which the respective operators, to whom the leased or so-called private cars belong or foreign railway fuel cars are consigned, are entitled according to the respective ratings of their mines; and that the said leased or so-called private cars shall always be delivered to the operators owning them and the said foreign railway fuel cars shall always be delivered to the operators to whom they are consigned by said foreign railway; and that in case said leased or so-called private cars or foreign railway fuel cars so delivered to the operator owning them or to whom they have been consigned are not sufficient in number to fill out his distributive share of available system cars, enough system cars are to be added to make up his share according to the rating of his mine as fixed and determined by the system of mine rating on the lines of the defendant.

84 *Ruling of the Court on Application for Preliminary Injunction.*

Filed September 23rd, 1908.

In the Circuit Court of the United States for the District of Maryland.

THE BALTIMORE AND OHIO RAILROAD COMPANY
vs.
THE INTERSTATE COMMERCE COMMISSION.

Application for Preliminary Injunction.

The complainant's motion for a preliminary injunction restraining the defendant, the Interstate Commerce Commission, from enforcing its order of June 2, 1908, made in the case of the Rail and River Coal Company, having been argued by counsel and submitted, and it appearing to this Court that the Interstate Commerce Commission had authority under the provisions of Section 15 of the Interstate Commerce Act, as amended, to consider and dispose of the matters presented by the petition in said proceeding and to examine into and decide whether or not any undue preference and unlawful discrimination forbidden by Sections 2 and 3 of said Interstate Commerce Act, or elsewhere in said Act, had been practised by said Railroad Company in its dealings with said Rail and River Coal Company, and it not being made to appear at this hearing that the facts adduced before the Interstate Commerce Commission, and found by them, were insufficient to sustain said order as applicable to
85 the case of said Rail and River Coal Company,

It is now Ordered that the application for a preliminary injunction be, and the same is hereby, denied.

September 23d, 1908.

NATHAN GOFF,
U. S. Circuit Judge.
J. C. PRITCHARD,
U. S. Circuit Judge.
THOS. J. MORRIS,
District Judge.

86 *Replication to Answer.*

Filed October 27th, 1908.

In the Circuit Court of the United States for the District of Maryland. In Equity.

Equity Docket, No. 54-F.

THE BALTIMORE AND OHIO RAILROAD COMPANY, Complainant,
vs.
THE INTERSTATE COMMERCE COMMISSION, Defendant.

Replication to Answer.

This replicant, The Baltimore and Ohio Railroad Company, saving and reserving to itself all and all manner of advantages of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the defendant, The Interstate Commerce Commission, for replication thereunto saith that it doth and will aver, maintain, and prove its said bill to be true, certain, and sufficient in the law to be answered unto by the said defendant, and that the answer of the said defendant is very uncertain, evasive, and insufficient in law to be replied unto by this replicant; without that, that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, or avoided, traversed, or denied, is true: all which matters and things this replicant is ready to aver, maintain, and prove as this Honorable Court shall direct and humbly prays as in and by its said bill it hath already prayed.

W. A. PARKER,
W. IRVINE CROSS,
Solicitors for Complainant.

87 *Testimony on Behalf of Complainant.*

88 In the Circuit Court of the United States for the District of Maryland.

No. 54, Equity Docket F.

THE BALTIMORE AND OHIO RAILROAD COMPANY
vs.
THE INTERSTATE COMMERCE COMMISSION.

WASHINGTON, D. C.,
TUESDAY, *October* 28, 1908.

Present on behalf of the complainant, Hugh L. Bond, Esq.
Present on behalf of the defendant, Luther M. Walter, Esq.

On October 28, 1908, at 10 o'clock, a. m., appeared before H. S. Milstead, a Notary Public in and for the City of Washington, District of Columbia, Mr. ARTHUR HALE, who, being duly sworn, testified as follows:

By Mr. BOND:

Q. Mr. Hale, please state your name, residence and occupation.

89 A. My name is Arthur Hale. I am living in Washington, D. C. I am General Superintendent of Transportation of the Baltimore and Ohio Railroad Company. I have held that position since December, 1902. Prior to that date I was Assistant General Manager of the same company, a position which I held from May or June, 1901. Prior to that I was in the service of the Pennsylvania Railroad Company, my service beginning in the year 1882. My railroad service has been chiefly in the transportation department, although I have had experience in the motive power department, in the repair of locomotives and cars, and I have had experience in the telegraph department as well. When I was Assistant General Manager I was of course in touch with all the operating departments of the railroad, but my chief experience has been in what is termed in railroads, the transportation department, which concerns simply the running of the railroad and more especially the handling of the equipment.

Besides my experience with these two railroads in the transportation and car matters, I have had a good deal of connection with the same work in the American Railway Association, where I am Chairman of all the committees which have to do with car questions, involving the interchange of cars between railroads, compensation therefor, etc.

Q. Will you not give a general descriptive statement of the Baltimore and Ohio Railroad system, showing the principal termini and main lines, especially with reference to the coal regions served by that system.

A. The main line of the Baltimore and Ohio Railroad begins at Philadelphia, Pennsylvania, although we have a detached railroad and terminals in Jersey City and New York. The main line beginning at Philadelphia runs through Baltimore, west to the Ohio River, reaching it at Parkersburg, at Wheeling, and at Pittsburg. From Wheeling and Pittsburg we have lines running west to Chicago, with branches to the Lake ports, at Fairport, Cleveland, Loraine and Sandusky.

90 The coal handled by the Baltimore and Ohio is raised in the Alleghany Mountains and their foot hills. Our oldest region, is the so-called Cumberland region, which is on our Cumberland Division. We get some coal from this division, and more coal from the Cumberland and Pennsylvania R. R. connection near Cumberland, where the first B. and O. coal came from in the beginning. That is the Maryland field. The next field to that is the Myersdale field on our Connellsville Division. The Pittsburg field is in the vicinity of Pittsburg. Going west from Cumberland we come into West Virginia, where is our largest field, which we call the Monongah, or the Monongah Division. There is a little coal in the vicinity of Wheeling, and then a great deal of coal in Ohio on our Cleveland and Newark Divisions. In connection with West Virginia there is a little coal on our Ohio River Division. The coal which is raised east of the Alleghanies, on our Cumberland and Connellsville Divisions, goes east, and about sixty per cent. of it is dumped into boats at tidewater. The bulk of the coal raised in Ohio goes west, a very large proportion of that being dumped into boats on the Lakes. The coal that is raised in the Pittsburg and Monongah Divisions goes part east and part west, rather more west than east.

The quality of the coal has a great deal to do with that, people being used to different kinds of coal in different parts of the country; but speaking generally the coal raised in the Cumberland and Connellsville regions, is semi-bituminous, that is, it has a small proportion of gas in it. As you go a little further west you have coking coal, a little more gas; further west you have true gas coal, which goes in the Pittsburg and West Virginia regions, and west of that you have a bituminous coal without so much gas in it. The gas coal is the coal that goes both east and west. Most of the semibituminous coal goes east, and coal of Ohio west only.

Beside the operating divisions I have spoken of, we have other divisions where there is no coal, but in all we have twelve operating divisions, and coal is raised on eight of them.

91 & 92 Q. I call your attention to paragraph 3 in the Bill of Complaint in this case, and ask you to state whether the list of operating divisions there given is correct?

A. Yes, sir; that is correct. In addition to those named here there is what we call our New York Division, which is situated in New Jersey and New York; but it is detached from the rest of the system.

Q. You have spoken of the main line of the Baltimore and Ohio system from an operating standpoint. The main charter line of The

Baltimore and Ohio Railroad Company, as I understand, extends from Baltimore to Wheeling?

A. From Baltimore to Wheeling is the regular main line.

Q. The line from Cumberland to Pittsburg is the old Pittsburg and Connellsville Railroad Company's line, is it not, operated under lease by the Baltimore and Ohio?

A. Yes, sir.

Q. The line from Grafton to Parkersburg, is the line of the Parkersburg Branch Railroad?

A. Yes, sir.

Q. What part of the traffic of the Baltimore and Ohio System does the bituminous coal traffic form?

A. About forty per cent., measured in tons; measured in revenue it is less, about thirty per cent. The revenue comes from the hauling of this coal.

Q. Can you give a brief statement of the number of mines directly on the Baltimore and Ohio Lines and its feeders; the general character of the coal, the market, and the tonnage from the various regions.

A. There are about 353 on our System now. When I last testified in this case there were less, but several have been opened since then. Those mines are operated by about 222 different concerns, some having more than one mine. Can I put this statement I have in my hand in the record as part of my testimony?

Mr. WALTER: It would save time just to submit it as part of your testimony.

Mr. BOND: It should be copied in the record.

The statement referred to by witness, is marked for convenience, "Statement A," and is as follows:

The Baltimore and Ohio Railroad Company.

Summary of Coal Traffic.

Division or district.	Class of coal shipped. Bituminous.	Class of coal shipped. Semi-bituminous.	Principal market.	Class of cars principally used for shipment.	Coal principally used for—	Tons commercial coal shipped year ending June 30th, 1905.	1906.	1907.	1908.
Cumb. & Penna. R. R.	....	/	East of Cumberland—Local, Export & Coastwise (A).	Hoppers and Gondolas.	Steam and domestic..	2,452,349	2,651,585	2,621,444	2,405,272
Cumberland Div. & West Va. Nor. R. R.	....	/	East of Cumberland, Md., and Coastwise (A).	Hoppers.....	Steaming purposes...	440,076	544,743	617,195	493,215
Monongah Div., West Va. Short Line, Fairmont, Morgantown and Pitts. R. R.	/	/	About 40 % west of Ohio River. About 60 % east of Ohio River (B).	All classes but the principal demand is for hopper cars.	Steaming purposes—Cement, and Gas and Steel plants... By-product Coke—Foreign..... R. R. Fuel and Domestic use.....	6,016,846	6,510,443	6,997,033	6,695,588
Ohio River Div...	/	....	Local trade O. R. Div. points.	Gondolas.....	Steam and Domestic.	24,068	45,795	49,148	55,236
Wheeling Div. East of Ohio River.	/	....	East—West and Local...	Hoppers and Gondolas.	Steam and Domestic*	358,575	476,000	587,262	516,139
Wheeling Div. West of Ohio River.	/	....	West.....	Hoppers and Gondolas.	Steam and Domestic.				
Newark Div. & Sunday Creek R. R.	/	....	West of Newark, O., and Lakes.	Largely Gondolas—Hoppers and Gondolas in Lake season.	Steam—Foreign R.R. Fuel and Domestic.	1,908,224	1,742,104	2,256,898	1,972,035
Upper C. L. & W.	/	....	Ohio, Mich., Ind., Ill. & Lakes.	Hoppers and Gondolas.	Steam—Foreign R.R. Fuel—Domestic.....	2,178,514	2,229,433	2,664,803	2,806,231
Lower C. L. & W.	/	....	Local points in Ohio.....	Gondolas.....	Steam and Domestic.				
C. L. and V. R. R.	/	....	Local points in Ohio.....	Gondolas.....	Steam and Domestic.				

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Connellsville Div. East of C'ville. .... /								
Johnstown & Stony Creek R. R. .... /	East of Cumberland, Md. and Coastwise via Tidewater piers (C).....	Hoppers.....	Steam and Domestic.	2,205,343	3,498,016	3,516,864	3,451,061
Ursina & North Fork R. R. .... /							
Pitts. Division .... /	East and West and Tidewater (D).	Hoppers and Gondolas.	Steam and Domestic— Cement, Gas and Steel plants.....	2,989,865	2,913,154	2,906,314	2,328,964
P. & W. Ry..... /	Local.....	Gondolas.....	Steaming purposes..				
Washington Run R. R. /	East and West and Tidewater (D).	Hoppers and Gondolas.	Steam — Domestic — By-product Coke...				
Total.....				18,573,860	20,611,273	22,216,961	20,723,741

* Coal mined at Underwood is used for Cement-Gas and Steel plants, as well as for Steam and Domestic use.
Mines in Wheeling District, East of Ohio River, ship largely to Steel plants and other industries at and in vicinity of Wheeling.

(A) Of the total combined coal shipments from these districts 58% Tidewater Coal for Pier delivery into vessels.
(B) About 28% of total coal shipments consist of Tidewater coal for Pier delivery into vessels.
(C) About 68% of total coal shipments consist of Tidewater coal for Pier delivery into vessels.
(D) About 12% of total coal shipments consist of Tidewater coal for Pier delivery into vessels.

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94 A. In addition to this coal there is a certain amount of coal that we handle, received from other lines.

Q. Have you a statement of that?

A. Here it is, there is over a million tons more. Some of it is handled short distances.

(The statement referred to is for convenience marked "Statement B," and is in the words and figures following, to wit:)

STATEMENT B.

Statement of Bituminous Coal Tonnage Received for Transportation by the Baltimore and Ohio Railroad from Foreign Railroads During the Years Ending June 30th, 1905, 1906, 1907, *and* 1908.

This coal was received from 54 foreign railroads and was transported by the Baltimore and Ohio Railroad in the cars in which it was tendered.

1905 tons	1906 tons	1707 tons	1908 tons
1,762,904	1,697,516	1,154,876	1,487,121

Q. Neither of these statements, as I understand, include coal consumed by The Baltimore and Ohio Railroad Company itself for fuel?

A. No, this is coal on which freight is paid.

In addition to the 20 millions or so of coal freight, which we handle, we handle between four and five million tons of coal
95 which we burn in our locomotives, and I will put in a statement which shows that. Here is a statement for four years, showing the amounts which we take in cars and the amount which we take directly in our engines.

(The statement referred to is for convenience marked, "Statement C," and is in the words and figures following, to-wit:)

STATEMENT C.

The Baltimore and Ohio Railroad Company.

Statement Showing Company's Fuel Coal.

	Year ending June 30, 1905.	*June* ending June 30, 1906.	*June* ending June 30, 1907.	*June* ending June 30, 1908.
Taken in cars.....	3,205,704 tons	3,520,642 tons	3,827,267 tons	3,750,070 tons
Taken in locomotive tenders.....	845,767 "	823,259 "	919,837 "	801,917 "
Total.....	4,051,471 "	4,343,901 "	4,747,104 "	4,551,987 "

Q. What is the car equipment of the Baltimore and Ohio System?

A. We own about 87,000 freight cars. I submit a statement showing the number of cars owned, by months, for the last four years. Also the number of cars on and off our lines, foreign cars on the lines; total number of railroad cars on the lines, and the balance against us—it is always against us. The statement also shows the number of private cars on our lines, and the total cars on the lines. These are all kinds of freight cars.

(The statement referred to is for convenience marked, "Statement D," and is in the words and figures following, to-wit:)

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The Baltimore and Ohio Railroad Company.

Freight Car Balance, January 1, 1905, *to September* 30, 1908.

Month.	Year.	System cars owned.	System cars off line.	System cars on line.	Foreign R. R. cars on line.	Total R. R. cars on line.	Balance For B. & O.	Balance Against B. & O.	Private cars on line.	Total cars on line.
Jan.	1905	83,504	27,307	56,197	14,986	71,183	0	12,321	5,526	76,709
Feb.	"	83,455	29,502	53,953	14,500	68,453	0	15,002	5,616	74,069
Mch.	"	83,662	29,876	53,786	16,068	69,854	0	13,808	5,407	75,261
April	"	83,720	29,348	54,372	15,982	70,354	0	13,366	5,344	75,698
May	"	83,733	25,989	57,744	13,497	71,241	0	12,492	5,340	76,581
June	"	83,392	24,401	58,991	12,616	71,007	0	11,785	5,094	76,701
July	"	83,093	21,743	61,350	11,181	72,531	0	10,562	4,522	77,053
Aug.	"	82,910	23,678	59,232	12,614	71,846	0	11,064	4,494	76,340
Sept.	"	82,704	28,045	54,659	14,610	69,269	0	13,435	4,461	73,730
Oct.	"	82,569	31,020	51,549	16,497	68,046	0	14,523	4,675	72,721
Nov.	"	82,392	31,907	50,485	19,416	69,901	0	12,491	4,857	74,758
Dec.	"	82,547	32,253	50,294	21,788	72,082	0	10,465	5,120	77,202
Avg.		83,140	27,922	55,218	15,313	70,531	0	12,609	5,038	75,569
Jan.	1906	83,971	31,982	51,989	23,195	75,184	0	8,787	5,378	80,562
Feb.	"	86,015	32,840	53,175	21,048	74,223	0	11,792	5,569	79,792
Mch.	"	88,602	34,954	53,648	19,092	72,740	0	15,862	5,659	78,399
April	"	89,942	34,436	55,506	17,849	73,355	0	16,587	5,589	78,944
May	"	90,094	31,693	58,401	17,772	76,173	0	13,921	5,572	81,745
June	"	89,978	29,679	60,299	17,521	77,820	0	12,158	5,483	83,303
July	"	89,476	28,387	61,089	15,991	77,080	0	12,396	5,435	82,515
Aug.	"	88,991	28,858	60,133	17,269	77,402	0	11,589	5,419	82,821
Sept.	"	88,785	29,859	58,926	19,097	78,023	0	10,762	5,979	84,002
Oct.	"	88,542	32,085	56,457	20,755	77,212	0	11,330	6,192	83,404
Nov.	"	88,288	35,311	52,977	19,910	72,887	0	15,401	6,202	79,089
Dec.	"	88,147	37,585	50,562	18,700	69,282	0	18,885	6,136	75,398
Avg.		87,569	32,306	56,097	19,017	75,113	0	13,289	5,718	80,831

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Statement D—Continued.

Month.	Year.	System cars owned.	System cars off line.	System cars on line.	Foreign R. R. cars on line.	Total R. R. cars on line.	Balance For B. & O.	Balance Against B. & O.	Private cars on line.	Total cars on line.
Jan.	1907	88,015	37,009	51,006	19,463	70,469	0	17,546	6,644	77,113
Feb.	"	87,856	36,430	51,426	21,684	73,110	0	14,746	7,156	80,266
Mch.	"	87,869	35,680	52,189	21,967	74,156	0	13,713	6,965	81,121
April	"	87,686	34,888	52,798	22,523	75,321	0	12,365	7,038	82,359
May	"	87,511	34,527	52,984	22,947	75,931	0	11,580	7,403	83,334
June	"	87,306	32,658	54,648	22,686	77,334	0	9,972	7,628	84,962
July	"	87,193	30,404	56,789	19,602	76,391	0	10,802	7,209	83,600
Aug.	"	87,069	28,363	58,706	16,735	75,441	0	11,628	6,789	82,230
Sept.	"	86,872	31,076	55,796	19,264	75,060	0	11,812	7,044	82,104
Oct.	"	86,680	31,404	55,290	22,185	77,475	0	9,219	7,020	84,495
Nov.	"	86,490	31,923	54,567	22,995	77,562	0	8,928	6,807	84,369
Dec.	"	87,956	26,003	61,953	19,244	81,197	0	6,759	3,921	85,118
Avg.	"	87,376	32,530	54,846	20,941	75,787	0	11,589	6,802	82,589
Jan.	1908	87,731	18,995	68,736	14,903	83,639	0	4,092	4,298	87,937
Feb.	"	87,633	17,298	70,335	14,322	84,657	0	2,976	4,206	88,863
Mch.	"	87,548	17,925	69,623	12,826	82,449	0	5,099	4,520	86,969
April	"	87,457	15,835	71,622	11,457	83,079	0	4,378	4,276	87,355
May	"	87,389	13,804	73,585	11,186	84,771	0	2,618	4,027	88,798
June	"	87,289	14,797	72,492	10,998	83,490	0	3,799	4,155	87,645
July	"	87,226	14,834	72,392	11,037	83,429	0	3,797	4,482	87,911
Aug.	"	87,141	16,221	70,920	13,446	84,366	0	2,775	4,826	89,192
Sept.	"	87,032	18,435	68,597	14,540	83,137	0	3,895	4,880	88,017
Avg.		87,383	16,460	70,922	12,746	83,669	0	3,714	4,408	88,076

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I also submit a statement, showing the number of cars available for the movement of coal which we own and which are on and off the lines. This is for the last four years. I also show for the last two years the number of foreign railroad coal cars on the lines, the total number of railroad coal cars on the lines, and the balance for and against. These foreign railroad coal cars are approximate. As our record stands, we are not absolutely sure that all of them were coal cars, but we consider that a very fair approximation. Our figures for our own cars are accurate.

(The statement referred to is for convenience marked, "Statement E," and is in the words and figures following, to wit:)

98 & 99 STATEMENT E.

The Baltimore and Ohio Railroad Company.

Coal Car Balance, January 1, 1905, *to September* 30, 1908.

Month.	Year.	Owned.	System coal cars Off line.	System coal cars On line.	Foreign R. R. coal cars on line.	Total R. R. coal cars on line.	Balance. Favor B. & O.	Balance. Against B. & O.
Jan.	1905.....	41,197	11,153	30,044	.....	.....	.....	.....
Feb.	"	41,044	12,764	28,280	.....	.....	.....	.....
Mch.	"	41,038	11,804	29,234	.....	.....	.....	.....
April	"	41,119	11,868	29,251	.....	.....	.....	.....
May	"	41,167	10,799	30,368	.....	.....	.....	.....
June	"	40,898	10,246	30,652	.....	.....	.....	.....
July	"	40,715	8,690	32,025	.....	.....	.....	.....
Aug.	"	40,655	9,888	30,767	.....	.....	.....	.....
Sept.	"	40,582	11,821	28,761	.....	.....	.....	.....
Oct.	"	40,512	12,938	27,564	.....	.....	.....	.....
Nov.	"	40,384	13,178	27,206	.....	.....	.....	.....
Dec.	"	40,372	13,647	26,725	.....	.....	.....	.....
Avg. per mo....		40,807	11,566	29,241	.....	.....	.....	.....
Jan.	1906.....	41,430	13,951	27,479	.....	.....	.....	.....
Feb.	"	43,026	14,993	28,033	.....	.....	.....	.....
Mch.	"	45,158	16,209	28,948	.....	.....	.....	.....
April	"	46,379	15,300	31,079	.....	.....	.....	.....
May	"	46,571	14,578	31,993	5,927	37,920	.....	8,651
June	"	46,429	13,627	32,802	7,139	39,941	.....	6,488
July	"	45,919	12,978	32,941	6,412	39,353	.....	6,566
Aug.	"	45,412	13,304	32,108	5,640	37,748	.....	7,664
Sept.	"	45,141	13,158	31,983	6,451	38,434	.....	6,707
Oct.	"	44,877	14,170	30,707	6,605	37,312	.....	7,565
Nov.	"	44,616	16,206	28,410	6,859	35,269	.....	9,347
Dec.	"	44,369	17,765	26,604	6,238	32,842	.....	11,527
Avg. per mo....		44,944	14,687	30,257	*6,409	*37,352	.....	*8,064
Jan.	1907.....	44,237	17,645	26,592	6,588	33,180	.....	11,057
Feb.	"	44,149	16,774	27,375	7,295	34,670	.....	9,479
Mch.	"	44,183	15,415	28,768	7,354	36,123	.....	8,060
April	"	44,108	14,331	29,777	7,326	37,103	.....	7,005
May	"	44,011	14,212	29,799	7,409	37,208	.....	6,803
June	"	43,911	13,606	30,305	7,120	37,425	.....	6,486
July	"	43,860	13,572	30,288	6,985	37,273	.....	6,587
Aug.	"	43,809	13,106	30,703	6,005	36,708	.....	7,101
Sept.	"	43,726	13,887	29,839	5,993	35,832	.....	7,894
Oct.	"	43,642	13,462	30,180	7,159	37,339	.....	6,303
Nov.	"	43,533	13,943	29,590	8,282	37,872	.....	5,661
Dec.	"	45,105	12,401	32,704	8,128	40,832	.....	4,273
Avg. per mo....		44,023	14,363	29,660	7,137	36,797	.....	7,226

*Average for eight months.

RTICAL IN BOOK

Statement E—Continued.

Month.	Year.	Owned.	System coal cars Off line.	System coal cars On line.	Foreign R. R. coal cars on line.	Total R. R. coal cars on line.	Balance. Favor B. & O.	Balance. Against B. & O.
Jan.	1908.....	44,974	9,955	35,019	5,707	40,726	.....	4,248
Feb.	"	44,941	8,311	36,630	5,745	42,375	.....	2,566
Mch.	"	44,909	9,119	35,790	5,204	40,994	.....	3,915
April	"	44,872	7,784	37,088	4,617	41,705	.....	3,167
May	"	44,847	6,671	38,176	3,165	41,341	.....	3,506
June	"	44,820	7,123	37,697	3,777	41,474	.....	3,346
July	"	44,794	7,122	37,672	3,892	41,564	.....	3,230
Aug.	"	44,758	7,872	36,886	4,292	41,128	.....	3,630
Sept.	"	44,729	8,554	36,175	5,291	41,466	.....	3,263
Avg. per mo....		44,849	8,057	36,793	4,627	41,420	.....	3,429

100 Q. Do these statements show any large acquisitions of cars during the periods covered, and if so when?

A. (Examining statement): We purchased approximately ten thousand new cars between November, 1905, and May, 1906.

Q. That is, when they were delivered?

A. That is when the purchase was completed, when we received them, let us say.

We also received about two thousand new cars on the first of December, 1907. I am not certain of that figure; it may have been only fifteen hundred.

Q. Seventeen hundred, I think, is correct. It was in December?

A. Yes, sir, the first of December.

Q. What part of the ten thousand cars you refer to were applicable to the coal trade, and what was their capacity?

A. Seventy-five hundred cars were applicable to the coal trade, and they were all 50 ton capacity cars. These statements do not show the full number, because a certain number of cars are condemned and destroyed every month, so that the exact figures do not show here.

Q. The cars going out, however, by condemnation are old cars of small capacity, are they not?

A. Yes, sir; all of them are thirty tons or less. I do not think we have condemned any of the forty ton cars.

101 Q. Is it not a fact that the purchase of these seventy-five hundred cars increased the capacity of the coal tonnage 316,900 tons, or 21 per cent?

A. It did.

Q. Will you state the total number of coal cars on June 30, 1908, and the total capacity?

A. On June 30, 1908, our records showed a total of 44,808 cars available for coal shipments, with a capacity of 1,801,926 tons.

Q. Have you any statement to show how far box cars are used in the coal trade?

A. Yes, sir, I have a statement, which I present, showing the number of box cars used in the coal trade in the fiscal year ending June 30, 1908, showing a total of over 7,000 cars.

(The statement referred to is for convenience marked "Statement F," and is in the words and figures following, to wit:)

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STATEMENT F.

The Baltimore and Ohio Railroad Company.

Statement Showing Number of Box Cars Loaded with Commercial Coal Year Ending June 30th, 1908.

Division.	July, '07.	Aug., '07.	Sept., '07.	Oct., '07.	Nov., '07.	Dec., '07.	Jan., '08.	Feb., '08.	Mar., '08.	Apr., '08.	May, '08.	June, '08.	Total.
Cumberland	.....	.....	7	2	.....	.....	1	.....	3	.....	.....	.....	13
Connellsville	83	178	115	173	215	130	41	26	19	6	12	12	1,010
Pittsburg	11	42	22	29	18	6	33	168	215	.....	.....	2	546
P. & W.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Monongah	773	597	463	694	693	387	240	312	402	116	373	227	5,277
W. Va. Short Line	7	2	5	11	2	7	.....	.....	1	.....	.....	.....	35
Ohio River	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Wheeling Term.	.....	.....	.....	5	.....	.....	1	.....	.....	.....	.....	.....	6
Lower C. L. & W.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Upper C. L. & W.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
C. T. & V.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Newark	.....	1	9	53	87	108	11	.....	10	.....	1	4	284
Total	874	820	621	967	1,015	638	327	506	650	122	386	245	7,171

ERTICAL IN BOOK

Q. When you speak of coal, you mean bituminous or semi-bituminous coal, and do not include anthracite?

A. My testimony excludes anthracite coal, none of which is raised on our lines.

Q. The figures in reference to coal coming from connections do not include any anthracite, do they?

A. No. The figures in reference to coal coming from connections exclude anthracite.

Q. Will you not state, from your experience and observation, how far the equipment, as to which you have testified, has proved sufficient for the transportation of the coal traffic originating on The Baltimore and Ohio Railroad, beginning at the present time and going back for the periods covered by the statements you have filed.

A. For the past twelve months our equipment has been amply sufficient to fill all orders for coal cars from all our mines and by all our connections. What shortages there were, were temporary, and were promptly made up. Prior to November, 1907, there was a very serious car shortage, which began in the month of
104 August, 1907. The equipment was fairly sufficient between May and August, 1907. Prior to the month of May, 1907, there were shortages which ran back into September, 1906. We had a very good supply from September, 1906, running back into April, 1906. Prior to that, for the years running back to the anthracite coal strike, we had a good car supply in the spring and summer months, and acute shortages in the late fall and early winter, for a couple of years. I should say we were able to fill our orders 75 per cent. of the days of the year. Then in 1903 there was a very serious coal car shortage, resulting from the anthracite coal strike. During and prior to the anthracite coal strike we had plenty of cars. That is as far back as my experience runs with the Baltimore and Ohio.

Q. That includes the period covered by these tables, does it not?

A. Yes, sir.

Q. The shortages to which you have testified, in the years 1906 and 1907, occurred after the acquisition of 7,500 addisional coal cars, an increase of the company's coal equipment by 20 per cent. in capacity, did it not?

A. Yes, sir.

Q. At the same time as the acquisition of those cars, did the company acquire any locomotives?

A. Yes, sir; we bought rather more locomtives than we thought we would need to move the cars. I think the total was 175. I have a statement of that here. We purchased the locomotives at the same time that we purchased these cars, and we had made another purchase of freight locomotives a couple of years before.

Q. What was the cause of the shortages in 1906 and 1907, about which you have testified?

A. The most important cause was that we were unable to keep our cars on the lines. Although we made this large purchase of

cars in the winter of 1905 and 1906, we had practically the
105 same number of cars and the same number of coal cars on our lines that year as in the previous year. The excess number of cars was entirely swallowed up by the other railroads, and this was especially noticeable at the time we needed the cars most—that is, in the winter. Up to the current year our cars have always left us in winter and come back in summer, and also up to the present year, they have always gone away a little faster in winter and come back a little slower in summer, and it was especially hard in 1906 and 1907.

Q. Have you any statement to show what the movement of the railroad was during those years, as compared with other years?

A. Yes, sir; I have a statement showing the freight car movement on the Baltimore and Ohio for the years 1902 to 1907, both inclusive. It shows the average loads moved per day in each month. These loads are the cars moved in through freight service. The cars in the local service are excluded. But every time the locomotives moved a car in through freight service, it is counted in this figure—"Loads moved per day." That shows, as well as can be shown, what the road is doing in the way of moving its freight; then we give the average loads in the yards per day—that is, the loaded cars that are ready for movement. In the next column we show the miles per car per day, which we have made, as an indication of our car efficiency. The next column shows the average number of engines which we had in freight service, those in actual service, and the last column shows the new freight engines we have acquired each month.

(The statement referred to is for convenience marked, "Statement G," and is in the words and figures following, to wit:)

The Baltimore and Ohio Railroad Company.

Car Movement, January 1st, 1902, to December 31st, 1907.

	1902.					1903.					1904.				
	Average loads moved per day.	Average loads in yds. per day.	Average miles per car per day.	Average No. engs. in frt. service.	New frt. engs. rec'd each mo.	Average loads moved per day.	Average loads in yds. per day.	Average miles per car per day.	Average No. engs. in frt. service.	New frt. engs. rec'd each mo.	Average loads moved per day.	Average loads in yds. per day.	Average miles per car per day.	Average No. engs. in frt. service.	New frt. engs. rec'd each mo.
Jan	13,400	6,758	22.1		....	12,123	11,524	18.7	573	....	11,036	10,664	19.5	612	3
Feb	11,503	8,411	20.0		....	13,501	10,351	19.8	587	....	12,416	10,085	22.7	635	5
March	13,100	9,051	23.8		....	14,637	10,154	22.1	600	7	13,690	9,536	25.9	623	11
April	14,175	7,738	23.8		....	14,211	8,345	22.2	626	33	13,962	8,178	26.7	604	3
May	14,528	7,600	24.3		....	14,721	9,521	21.6	687	35	12,737	6,063	24.6	572	1
June	14,740	9,177	23.2		....	14,826	7,945	21.2	673	1	12,961	7,145	25.1	596	....
July	13,176	11,032	21.0		....	13,950	8,003	21.3	662	4	13,112	6,956	24.7	611	....
Aug	13,926	12,697	22.0		3	14,239	7,923	22.3	667	28	13,695	7,639	25.7	603	....
Sept	13,729	12,335	19.8		18	14,606	7,479	23.3	677	13	14,633	8,414	25.8	622	....
Oct	13,868	11,326	....		13	14,209	7,813	23.3	675	3	14,759	7,632	27.0	646	....
Nov	14,030	10,338	....	Records Destroyed.	11	13,161	8,301	21.9	680	1	14,319	8,079	27.2	635	....
Dec	12,350	10,738	18.6		3	11,897	9,014	21.0	641	2	13,378	9,546	25.6	636	....
					Total:					Total:					Total:
Average	13,544	9,767	21.9		48	13,840	8,864	21.6	646	127	13,392	8,328	25.0	616	23

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Statement G—Continued.

	1905.					1906.					1907.				
	Average loads moved per day.	Average loads in yds. per day.	Average miles per car per day.	Average No. cngs. in frt. service.	New frt. engs. rec'd each mo.	Average loads moved per day.	Average loads in yds. per day.	Average miles per car per day.	Average No. engs. in frt. service.	New frt. engs. rec'd each mo.	Average loads moved per day.	Average loads in yds. per day.	Average miles per car per day.	Average No. engs. in frt. service.	New frt. engs. rec'd each mo.
Jan	13,481	10,045	26.4	687	....	16,627	9,407	31.7	717	60	15,365	8,009	30.4	745	....
Feb	13,249	9,160	26.2	600	....	15,898	8,286	30.4	733	30	16,016	8,986	30.7	755	....
March	15,132	9,013	30.0	597	....	16,577	7,060	32.2	763	45	16,233	9,049	30.4	761	....
April	15,236	6,969	30.3	620	....	15,623	6,480	31.0	709	14	17,822	8,560	31.3	749	....
May	14,916	6,456	29.7	632	....	16,491	6,672	31.1	711	....	17,738	7,729	32.1	735	....
June	15,168	6,092	28.9	614	....	16,445	6,209	30.5	718	1	17,695	7,799	30.5	733	....
July	14,151	6,250	27.7	599	....	15,952	5,993	29.8	714	....	16,424	7,702	29.3	709	....
Aug	15,415	6,323	29.6	612	....	16,370	6,406	30.1	715	....	17,001	8,166	30.6	719	....
Sept	16,139	6,502	31.8	624	1	17,009	6,684	30.4	740	....	17,221	8,450	30.4	728	....
Oct	16,677	6,840	33.1	642	....	17,266	6,727	30.6	746	....	17,462	9,648	29.6	716	....
Nov	16,761	7,351	32.8	662	20	17,062	6,858	32.1	733	....	16,743	9,038	29.7	729	....
Dec	16,161	8,146	31.4	691	6	15,653	6,750	31.4	742	....	13,459	8,776	25.7	722	....
					Total:					Total:					Total:
Average	15,207	7,429	29.8	632	27	16,414	6,962	30.9	729	150	16,598	8,493	30.1	733	0

FOUND VERTICAL IN BOOK

Q. This is one of the regular tabulations which was made for your own information covering that period, and not specially prepared for this case?

A. This is a table I got up a year ago for an entirely differ-
107 ent purpose, and the figures in it are figures which are used daily in our office. All of those figures are our regular working figures. They are of course divided up by days and divided geographically for each of our divisions.

Q. The statement A which you filed shows that the coal tonnage moved, increased in 1906 over 1905, approximately, 2,100,000 tons; and in 1907, increased over 1906 approximately, 1,600,000 tons. The statements D and E which you have filed show the number of coal cars and other cars on and off the lines of the Baltimore and Ohio, and the car balance with other lines; and you have testified the result to have been that the Baltimore and Ohio had on its lines practically no more coal cars after the acquisition of the new cars than before. Table G shows the number of loads moved per month and shows that those loads increased for 1906.

A. That is, per day, it shows monthly the average per day.

Q. Shows an increased average per day for the year 1906 over the year 1905, and for the year 1907 over the year 1906.

What conclusion, bearing on the question as to the cause of car shortages in 1906 and 1907, do you draw from those facts?

A. The shortages would have been very much worse if we had not succeeded in moving our equipment faster in 1906 and 1907 than we did in 1905. We increased the miles per car per day very materially; and by so doing we cut down the shortages.

Q. So that notwithstanding you had no more cars you did move more coal?

A. Yes, sir.

Q. Suppose you had had the cars you bought, what do you think would have been the result?

A. We would have moved a great deal more coal.

Q. Can you, from your knowledge in the Baltimore and Ohio service, as well as from your knowledge in your position with the American Railway Association, give us any comparative statement of the car conditions on the Baltimore and Ohio Rail-
108 & 109 road Company, as compared with the other bituminous coal roads?

A. This statement, which I now submit, is taken from the report of the Car Efficiency Committee, of which I am Chairman, and compares the Baltimore and Ohio with the other principal eastern bituminous coal roads,—the Pennsylvania, New York Central Lines, Chesapeake and Ohio, and Norfolk and Western. The periods taken are the month of October, 1907, when the last acute car shortage was, and the month of January, 1908, when there was the first large car surplus period.

This shows that during the time of the car shortage, the Baltimore and Ohio was worse off in its car balance than any of the other bituminous roads, as we were short over 12,000 cars of the number we owned. We had on the line only 85 per cent. as many cars as

we owned. The Norfolk and Western percentage is a little lower, as they had only 82 per cent. But they were only 6,700 cars short, while we were over 12,000 short.

The figures for January, 1908, are given to show that when we did not need the cars they came back to us, as in 1908 we had 91 per cent. as many cars as we owned. The other figures show the provision we made for moving freight cars, as compared to other railroads. We had in October, 1907, for every freight engine owned, only 57 cars on the line, a smaller number than is shown by any other road, except the Norfolk and Western. We made 27.7 miles per day, a greater mileage than any railroad, but the Norfolk and Western.

Q. The Baltimore and Ohio cars that are on other railroads, are subject to their use, are they not?

A. Yes, sir.

Q. And when they have special demands for cars, the easiest way to meet those demands is to use our cars?

A. Absolutely.

Q. The statements you have filed show only loaded car movements. Is it or is it not a fact that the empty car movement on the Baltimore and Ohio system, particularly in respect to coal cars is a simple proposition if the loads move?

A. The coal cars very seldom get a return load; and on practically every part of our line the engine that moves the coal cars can haul back a great many more empties, at the same speed, that it has taken loads. Therefore, the movement of the load is the difficult problem for the Superintendent, for the empties can almost always be hauled back with great ease whenever they turn up, because you can put a great many more of them on a train.

(The statement referred to is for convenience marked, "Statement H," and is in the words and figures following, to wit:)

STATEMENT H.

The Baltimore and Ohio Railroad Company.

Car Balance as Compared with Other Bituminous Coal Roads.

Top Line Shows Daily Average for January, 1908; Lower Line Shows Daily Average for October, 1907.

Caboose and Service Cars Not Included.

		B. & O. R. R.	P. R. R.	Penna. Co.	New York Central lines.	C. & O.	N. & W.
Revenue Freight Cars owned	1908	83,639	149,719	76,320	175,043	33,455	47,317
	1907	82,578	148,737	76,320	171,650	31,786	37,978
Number of system cars on line	1908	61,785	99,379	73,152	120,427	21,148	26,518
	1907	48,629	97,771	43,784	93,060	21,124	21,048
Foreign R. R. Cars on line	1908	14,704	22,931	10,081	59,222	6,774	4,939
	1907	21,935	42,296	24,464	86,054	11,241	10,203
Total R. R. Cars on line	1908	76,489	122,310	83,233	179,649	27,922	31,457
	1907	70,564	140,067	68,248	179,114	32,365	31,251
Excess	1908	.....	.....	6,913	4,606		
Excess	1907	.....	.....	.....	7,464	579	
Deficit	1908	7,150	27,400	.....	.....	5,533	5,860
Deficit	1907	12,014	8,670	8,072	.....	.....	6,727
Per cent R. R. cars on line of total owned:							
Home	1908	74	67	96	69	63	71
	1907	59	66	57	54	66	55
Foreign	1908	17	15	13	34	20	13
	1907	26	28	32	50	36	27
All Railroads	1908	91	82	109	103	83	84
	1907	85	94	89	104	102	82

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Private Cars on line	1908	4,263	16,165	5,154	11,732	512	0
	1907	6,924	17,657	5,765	12,314	762	0
Total all Cars on line	1908	80,752	138,475	83,387	191,381	28,434	31,457
	1907	77,488	157,724	74,013	191,428	33,127	31,251
No. of Freight Engines owned	1908	1,359	2,486	1,087	2,684	495	769
	1907	1,360	2,498	1,036	2,504	495	675
Av. Cars on line per Freight Engine owned	1908	59	56	81	71	57	41
	1907	57	63	71	76	67	46
Average miles per car per day	1908	21.7	22.6	17.4	24.3	22.7	22.4
	1907	27.7	25.7	25.5	26.5	22.9	31.4
No. Freight Engines per 1,000 freight cars owned	1908	16.26	16.61	14.25	15.34	14.78	20.62
	1907	16.46	16.80	13.58	14.59	15.57	17.76
No. Freight Engines per 1,000 freight cars on line	1908	16.82	17.95	12.30	14.02	17.43	24.41
	1907	17.55	15.84	14.00	13.08	14.95	21.56

OUND VERTICAL IN BOOK

111 Q. As a matter of fact, during the period in which you filed statements showing the loaded car movement, how was the empty car movement back?

A. The empty movements were well kept up through the whole period, and were especially well kept up in the years 1906 and 1907.

Q. What is power enough to move the load is surplus power to move the empties, under any ordinary conditions?

A. Yes, sir.

Q. You have testified as to the cause of the car shortages in 1906 and 1907, and in your statement as to the car efficiency back of 1906 and 1907, you refer to shortages in the winter months. What was the cause of the shortages in the winter months?

A. There were many causes for shortages in the winter months, but the most important, basic, cause, was the increase in the price of coal, which, of course, was caused by an increase in demand.

Q. Please explain how that gets around a car shortage; it is not very clear.

112 A. We handle almost as much coal in the winter as in summer. On very cold days and on snowy days of course we do not handle near as much, but as a rule we average very well during the winter months. But the coal is not consumed equally all throughout the year. More coal is burned in winter than in summer, and when there is an increase in the demand for coal, for any cause, the price rises rapidly. The reason that the price of coal rises so rapidly is that a large proportion of the coal burned is supplied on yearly contracts, which are made at a comparatively low price, with a small margin of profit, and those contracts are not exactly lived up to.

Let me say again, these contracts are generally made for the maximum consumption of the purchaser, and during the summer the purchaser very seldom is willing to take the total amount of his contract. When the winter comes it is quite usual for the purchaser to demand the full amount of his contract, and the increased demands from contract purchasers alone are frequently so great that the parties who have made the contracts cannot get enough cars to fill the contracts. It is the same contract as it was in the summer. The shipper has practically the same cars he had in the summer months. The purchaser is demanding the full amount of his contract instead of a portion of the contract.

The thing that follows is that the contractor looks around and tries to buy coal of somebody else, and the price of spot coal, as it is called, rises very rapidly, there being a very small amount of spot coal on the market.

The minute the price rises the coal operators who have shut down in summer, because they have not contracts, open up again and demand their share of cars. They enter into correspondence with all consumers they know, and try to get direct orders, and they also attempt to sell their coal to the people who have contracts. It is by no means unusual, during times of car scarcity, to have mines open up, and load cars without having any idea where the coal is going,

and then enter into correspondence by letter, by wire, or by
113 'phone, with parties whom they know have contracts, with the idea of selling them this coal at an advanced price.

That process, you can see, during continued cold weather, is something that grows like a snowball, and the price of coal sometimes goes very high. That of course makes the loss to the parties who have contracts very considerable, because they are obliged to buy their coal at high rates, in order to fill their contracts, and it also makes it profitable to work mines which cannot live with the average price coal.

Just as soon as the price gets above a certain amount, these mines, which for one reason and another, produce expensive coal, open up. Their orders come in and increase the demand for cars.

That is why I say the price is the leading factor, because if the price does not go up, these mines which are costly to work, do not open up at all, and there is not the demand, and therefore not the apparent shortage.

From some points of view these shortages are not really shortages at all. There was a genuine coal shortage in the year following the anthracite strike, and the price of coal went up very high. I know it to have been up to $15 and $20 a ton, during that period. None of that happened in 1906 or 1907, so that the shortage was really more a fencing around between coal operators, than a real shortage to the consumer.

Q. Is there much loss in car efficiency, from freezing of coal in the cars?

A. Very considerable; yes, sir; especially at tidewater points where such a large proportion of our coal is dumped by us into vessels. We feel it especially because we know how difficult it is to get the coal out of the cars when it is frozen, and that is a case where the delay falls on the railroad. Where it falls on the consignees, it has been found necessary to allow extra free-time to the consignee when his coal is frozen.

Q. But notwithstanding that fact, you say that substantially the same number of cars are placed for loading in winter as in summer?

114 A. Very nearly the same, yes, sir; although the orders are very much larger in winter than in summer.

Q. How much larger in winter?

A. I have some figures here. I find that in the summer of 1906 the orders ran about 80,000 cars a month on our line. That increased until in October, 1906, there were orders placed for 100,000 cars, and in November and December, the orders ran 100,000 and 96,000. In January, 1907, the orders ran to 97,000. There are about 20,000 more cars a month ordered in winter than in summer.

Q. About 25 per cent. increase?

A. About 25 per cent. increase, yes, sir. The orders would be very, very much greater if it were not that under our system of car distribution, if a man orders more cars than he needs, and we place them and he does not load them, we charge the cars left over against

him next day. That has brought the orders down. In previous years the orders used to be a great deal more, proportionately.

Q. As a matter of business experience and fact, it would not require any such number of cars, however, to satisfy the demands represented by those orders—are not the orders duplicates of the same business contracts?

A. Very frequently. In all these cases where cars are ordered from us and loaded up by a shipper without knowing where they are going, it is a duplicate, and sometimes a triplicate of the same order. Whenever a shipper who has a contract, cannot fill that contract, and attempts to buy coal from others, his order for cars is duplicated, or triplicated according as he places that order with one or two other persons. He will order the cars he wants from us, and he will place that order with the other men, and each of them will order the cars that they want. That duplication of orders shows up especially at any point where shippers on sidings order cars from various railroads.

Here is an example, not in the coal trade, but it is at a place where you can appreciate it more thoroughly. The man in
115 Chicago, when he wants to ship grain east, during a car shortage, will order his cars from six or eight eastern roads, and that will show up as a shortage on every one of those roads, when really it is only a single shortage. The same thing occurs in the coal trade whenever cars get scarce. The orders are duplicated, if you look at it from the point of view of the consumer. The man who really wants a car of coal in a hurry will have his orders so placed that it may appear to the railroad as if there were three or four cars wanted.

Q. Can you state whether in your judgment the car equipment, taken with the locomotive and other equipment of the Baltimore and Ohio Railroad, is sufficient to move the coal offering on its lines?

A. It is entirely sufficient.

Q. You have testified that there were approximately 353 mines served by the Baltimore and Ohio system. How are the cars placed at and taken from those mines?

A. The empty cars are moved to a central point on each district or sub-district, and from that point they are moved by coal engines, we call them, which move the empties to the mines, and usually take out loads when they place the empties.

Q. Are those operations by the operating divisions?

A. The divisions are practically the same as our operating divisions. There are some slight exceptions, involving a few cars a day, where the mines of one division happen to be very close to the distributing point on another; but practically the distribution is handled by the same divisions as our regular operations.

Q. And then the distribution is substantially by the same divisions as shown on your table A?

A. Yes, sir; they come very close together.

Q. I will ask you to explain the basis on which the empty cars are distributed to the mines?

A. When they are plenty of cars, we fill all orders. Whenever in any period the cars are not sufficient to fill orders, we distribute the available cars on a percentage basis.

116 Q. What is the percentage basis?

A. Each mine given a percentage of the total distribution in a region, and that percentage is based on two factors. The first factor is the physical capacity of the mine, as ascertained by our mine inspectors, and checked up by the mine owner. The second factor is the commercial capacity of the mine, as indicated by its past shipments in two periods when the car supply was free.

Q. Periods in successive years?

A. Two periods in successive years, when the car supply was free.

Q. Won't you look at the report of the Commission, in the case of the Rail and River Coal Company *vs.* The Baltimore and Ohio Railroad Company, which is filed as an exhibit in this cause, and state whether the statement by Commissioner Harlan on pages 93 and 94, as to the method of rating mines of the Baltimore and Ohio Railroad Company is a correct statement?

A. I read this over carefully yesterday. It is a correct statement of our method.

Q. As bearing on the system of rating, and further showing the facts stated by the Commissioner, have you any statement to show the theoretical output of the mines of the Baltimore and Ohio Railroad system, if the basis of the physical capacity you found was taken as the sole measure of their output?

A. Yes, sir; I have figured that up for the last four years.

Q. And reached the astounding result that we would have about 73,000,000 tons of coal to ship?

A. I made a few figures on that, showing that four years ago the mines shipped about 33 per cent. of their physical capacity and this last year it is down to about twenty per cent. of their physical capacity. It ran along for two years at 33 and 30 per cent., and now is down to nearly 20 per cent. But of course the panic has something to do with that.

(The statement referred to is for convenience marked, "Statement I," and is in the words and figures following, to wit:)

117 & 118 STATEMENT I.

The Baltimore and Ohio Railroad Company.

Statement Showing Theoretical Output Based on Physical Capacity of Mines Located on Each Division of the Baltimore and Ohio R. R.

Division.	Physical capacity daily, 1904-1905.	Theoretical output for one year, 305 working days.	Physical capacity daily, 1905-1906.	Theoretical output for one year, 305 working days.	Physical capacity daily, 1906-1907.	Theoretical output for one year, 304 working days.	Physical capacity daily, 1907-1908.	Theoretical output for one year, 306 working days.
	Short tons.	Short tons.	Short tons.	Short tons.	Short tons.	Short tons.	Short tons.	Short tons.
Cumberland Div.	5,481	1,671,705	7,516	2,292,380	7,465	2,269,360	7,010	2,145,060
Monongah Div.	68,618	20,928,490	75,493	23,025,365	73,838	22,446,752	82,230	25,162,380
W. Va. Short Line	5,322	1,623,210	5,465	1,666,825	6,385	1,941,040	8,295	2,538,270
Ohio River Div.	795	242,475	*795	242,475	840	255,360	1,300	397,800
Wheeling Div.	5,302	1,617,110	6,575	2,005,375	6,910	2,100,640	8,445	2,584,170
Lower C. L. & W.	13,676	4,171,180	21,275	6,488,875	22,215	6,753,360	26,170	8,008,020
Upper C. L. & W.	5,151	1,571,055	5,150	1,570,750	6,090	1,851,360	5,200	1,591,200
C. T. & V. R. R.	2,305	703,025	2,040	622,200	1,695	515,280	1,460	446,760
Newark Div.	18,912	5,768,160	24,520	7,478,600	28,025	8,519,600	29,100	8,904,600
Connellsville Div.	21,945	6,693,225	30,612	9,336,660	34,010	10,339,040	39,890	12,206,340
Pittsburg Div.	23,475	7,159,875	25,750	7,853,750	29,210	8,879,840	26,905	8,232,930
P. & W. Ry.	1,140	347,700	2,385	727,425	1,725	524,400	1,515	463,590
Total	172,122	52,497,210	207,576	63,310,680	218,408	66,396,032	237,520	72,681,120

* No reinspection this period—Old figures used.
The number of working days arrived at by deducting Sundays and Legal Holidays from the total days in year.

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119 Q. Do you mean that it is 30 per cent. of their physical capacity or their percentage capacity?

A. 30 per cent. of their physical capacity. When you come to compare the physical capacity with the actual shipments, of course it always brings the figure down, and that gives a tonnage figure which we do not use at all, except as a basis for percentages. This is straight physical capacity here.

Q. As a matter of fact, can you state what percentage the actual shipments are of the capacities you use in making up their percentages?

A. No, sir; not offhand. It is very much less, but I cannot say offhand what it is. I do not think I have ever added these figures up for divisions.

Q. The reason that this table which you filed reaches such astounding results, as compared with the actual output shown in your table A is, first, that it assumes that there are men enough to work at each working place in any of these mines?

A. Yes, sir.

Q. And secondly, that such an amount of coal could be marketed if it were produced?

A. Yes, sir. We know perfectly well there are not enough miners in the country to fill up all the mines in the United States, to man them at their physical capacity.

Q. In the actual practice you use this theoretical physical capacity only as one factor in three?

A. One factor in three; yes, sir.

Q. The other two factors being the actual commercial shipment——

A. Actual shipments on which freight was paid, excluding our fuel coal.

Q. The time of those shipments is taken when?

A. The time of those shipments is taken when there is a free car supply. When we go on percentage again we will be able to have a whole year of free car supply as one of those elements.

Q. Why do you confine it to time of free car supply?

120 A. So that the percentage will not be influenced in any way by the use of cars which are not available in percentage distribution. I think I had better explain that by saying that the first year in which this system was in effect, we took to indicate the commercial capacity of the mine, the shipments for two full previous years; but on considering the matter and discussing it with the shippers, they raised the point that it was unfair to base a percentage this year on the cars distributed under the percentage system the previous year. We saw that was a good point, and we therefore excluded all cars distributed on a percentage basis and took periods when the basis was not in effect, but when all orders were approximately filled.

Q. Having arrived at the various percentages of the mines in distributing districts, what do you do then?

A. We make the distribution of our available cars on that basis, and keep a very careful account of the cars which we distribute. That account is necessary to enable us to even up from day to day

and from period to period. The evening-up process is necessary because generally speaking no car distributor knows on a given day how many cars he has to distribute.

Q. That is, in advance?

A. Yes, sir, in advance. A car distributor when he gives the orders to his conductors as to the number of cars to place at each mine, knows how many empties there are in his distributing yard, how many empties there are en route to him, how many empties will come out of the shops—he can make a guess at that. But he does not know how many cars the conductor will finally be able to get to the mine before quitting time, and he does not know how many cars are going to be free in other ways on the division or at the mine, all of which have to be counted in. As a result the car distributor is a good deal in the dark as to exactly how many cars he should order to each mine, and exactly how many cars will get there in time to load that day. He receives, however, at the end of the day accurate reports both from the mine operator and from his conductor, from which he can make an accurate record of
121 how many cars have actually been delivered. And from that he can the next day make an attempt to even up either his shortage or an overage.

Q. Are those records transmitted to your office?

A. Those records are all transmitted to my office, and are all checked up in my office. We decide finally how many cars each mine is over and how many short, and are in constant communication with various superintendents, to whom these car distributors report in regard to this distribution, so that a perfectly fair distribution of available cars shall be made to each of our mines.

Q. That is your object in keeping that account—to make your actual performance correspond in the end, at any rate with the estimate, as you have ascertained under the percentage.

A. Exactly.

Q. How carefully are those accounts kept?

A. They are kept with very great care, and are checked up not only by our office, but by the superintendent's office and the car distributor's office. They are also subject to check by the operator, as the reports are available for inspection by the operators.

Q. Are they posted in distributing offices?

A. They are available; anyone can see them who goes in. The actual posting has been discontinued, but they are available for any operator. We provide facilities for the operators who want to copy any distribution sheets in any of the several divisions.

Q. Is there any other way to get a final accurate distribution, and at the same time have an accurate record of what has been done, except by keeping practically such a ledger account with each mine, as you keep it?

A. I see no way of keeping the thing accurately without going into such great detail. It has been our system to hold to a fixed percentage for each mine, through a definite period, until the
122 percentages change. We are able at the end of any period, week or month, to apply that percentage to the available cars

and prove our back accounts in that way. That is why we have held onto this system, so that at any time we can go back and prove the distribution in gross, although as I have explained it is made from day to day.

Q. In keeping those accounts, is it necessary to charge the operator on the one hand with what he has received, and to credit him, on the other hand, with any cars that he should have received and has not received; is that it?

A. Exactly; yes, sir.

Q. Is that what you mean by your over and short accounts?

A. Yes, sir. There is, however, another set of charges which we are obliged to make when the operators attempt to delay cars.

Q. That is, when they attempt to delay cars, you treat them as having had the cars?

A. We treat them as having received the cars every day they have held them.

Q. To what cars of the Baltimore and Ohio Railroad does this system of percentage distribution apply?

A. It applies to all coal cars which are——

Q. (Interrupting:) I am speaking now of the time prior to the taking effect of the Commission's order in this matter, which was October 1st.

A. All my testimony has been on that system, and not on the present system, which is in accordance with the Commission's order. This is the system we had in effect up to October 1st. The percentage system of distribution in each region applies to all the Baltimore and Ohio coal cars available in that region and to foreign coal cars that are available in that region as well.

Q. When you say available, in reference to Baltimore and Ohio cars, you exclude such a car that is to be loaded with railroad fuel for The Baltimore and Ohio Railroad Company, do you?

123 A. Yes, sir; we exclude any car that would be loaded with stone or lumber, or anything else than coal freight; and in coal, we excluded cars loaded with fuel for our own use.

Q. In case of the cars owned by other railroad companies, you exclude those specially consigned by the owners to mines on the Baltimore and Ohio Railroad, for the carrying of fuel for their own railroad?

A. Yes, sir.

Q. Those are what is known in this proceeding as foreign railroad fuel cars, are they not?

A. Yes, sir.

Q. And as to cars owned by individuals, not by railroad companies, whether those individuals be operators or consumers, or receivers of coal, your system of percentage distribution does not apply to those cars?

A. It does not apply to those cars.

Q. How is it in your over and short account—do any of the cars to which you do not apply the percentage distribution enter at all in your account?

A. Yes, sir; in this way. Whenever a mine has so many special

cars that it cannot load its full percentage of our cars in any one day, we charge that mine with the total number of cars the percentage would give it. Normally each mine is entitled to its percentage of B. & O. cars, but if for any reason the mine does not load its percentage, presuming the percentage to be available, if they do not order and load that percentage, we are obliged to charge them with the full percentage. If we did not, a mine could by shutting down or by working only a few men, in comparatively good seasons, accumulate a shortage—if you will allow the paradox—and then when coal gets to a higher price, they could demand that that shortage be made up. That would be unjust to the shippers who have gone along loading their percentage every day. In order to avoid that accumulation of credit, we are obliged to keep a very careful system of charges against every mine, charging them
124 & 125 out with their percentage whenever they fail to load it. If they do not load their percentage, from our fault, then it is made up to them; but if they fail to load their percentage, from their fault, it is charged against them.

In the case of these individual, foreign fuel cars, and the B. & O. fuel cars also, there are frequent occasions when on particular days mines will receive so many of these exceptional cars that they will not be able to load their full percentage of B. & O. cars. On such occasions our method is to charge them with their full percentage, which of course gives the other mines a larger number of our cars. It is practicable, I presume, in cases of that kind, to alter the percentage of each mine every day. Some railroads do. Suppose, here is a mine which perhaps can load thirty cars. It gets twenty of these exceptional cars, and its percentage would give it 20 B. & O. cars, so that it can only load ten B. & O. cars. Under our system we give them ten cars and charge them with ten cars more. The other ten are distributed pro rata among the other mines. It is perhaps practicable to reduce the percentage of that mine for a particular day, and to give all the other mines in that region a new set of percentages for that day, and make the charges on that basis. But it involves a tremendous amount of bookkeeping, and you lose that check I was speaking of. You lose the power of taking a full period and applying this invariable percentage to it, so that we prefer our present method of charging up the cars.

Q. The final result to the operators in any district is the same by your system of bookkeeping as it would be if you charged percentages, as you state?

A. Exactly the same.

Q. The only difference is you get a consecutive record, which can be checked, and if you change percentages every day and establish a different percentage for the day, you could not keep such a record; is that it?

A. You would lose that check. To verify an account you would have to go over it day by day and be sure every figure is right. By our method you can take any period and by applying the percentage to it, you can check the full period.

Q. It is purely a matter of bookkeeping then?

A. It is purely a matter of bookkeeping. But at the same time, if we did not have proper bookkeeping we might give a very considerable advantage to the mine that does not use its full quota of our cars in periods when the price of coal is comparatively low, by allowing it to accumulate this credit, and then calling on us for cars when the price goes up.

Q. Is that not equivalent to saying that a man is charged with cars that he does not take, when he does not take them because he does not want them or because he has private cars?

A. Yes, sir. The private cars show up a disability, just the same as if the mine broke down.

Q. Can you present a statement showing the number of such private or individual cars on the line of the Baltimore and Ohio system.

A. The statement I have here shows the private corporations that operate coal cars on our line, with the number of their cars on the line on June 30, 1908, and the total owned and controlled, so far as we know it.

(The statement referred to is for convenience marked, "Statement J," and is in the words and figures following, to wit:)

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STATEMENT J.

Private Co. and Individual Coal Cars, June 30, 1908.

	On line.	Off line.	Owned or controlled.	Capacity in tons.
Fairmont Coal Co.	155	....	251	7,060
George's Creek C. & I. Co.	164	....	300	15,000
Lorain Coal & Dock Co.	74	....	74	2,960
Pitts.-Baf. Co.	110	....	472	19,030
Pitts. Coal Co.	251	....	3,262	110,265
Quemahoning C. Co.	342	....	400	20,000
United Coal Co.	439	....	1,010	50,500
Total Private and Individual Coal Cars.	1,535	....	5,769	224,815
Consumers' Coal Cars.				
Beaver Tin Plate Co.	6	....	6	180
Maryland Steel Co.	254	....	500	25,000
Total Consumers' Coal Cars	260	....	506	25,180
Coal Co.'s with Mines Located on Lateral Lines.				
Washington C. & C. Co.	19	....	210	6,230

Coke Cars not included.

127 I would like to make an explanation as to some of those back figures, where the total number of cars owned does not quite agree, t' difference being that the caboose cars and maintenance of way cars, are in some statements and not in others. I think that ought to be put in as a note on one of those tables. Table H is a full one, and if we put it on that table, it will make the record all right.

—. Can you state the number of foreign railroad fuel cars on the lines of the Baltimore and Ohio system?

128 A. The number of foreign railroad fuel cars loaded on the line in the year 1908, total up nearly forty thousand cars.

Q. These are the number of foreign railroad cars sent on for fuel by those railroads and loaded?

A. That is right. Those individual cars were loaded many times in a year. The statements do not compare. These are foreign cars loaded, while the other is individual cars in existence.

(The statement last referred to is for convenience marked, "Statement K" and is in the words and figures following, to wit:)

STATEMENT "K."

Showing Foreign Railroad Fuel Cars Loaded Year Ending June 30th, 1908.

Division.	July '07.	Aug. '07.	Sept. '07.	Oct. '07.	Nov. '07.	Dec. '07.	Jan. '08.	Feb. '08.	Mar. '08.	Apr. '08.	May '08.	June '08.	Total.
Cumberland	....	....	....	....	....	....	....	....	....	....	....	....	....
Connellsville	54	34	....	....	....	....	....	....	....	....	....	....	88
Pittsburg	....	....	....	....	....	....	....	....	....	....	....	....	....
P. & W.	....	....	....	....	....	....	....	....	....	....	....	....	....
Monongah	520	529	907	987	1,644	1,363	1,166	1,190	1,887	908	1,401	1,309	13,811
W. Va. Short Line	225	201	265	196	255	155	228	150	182	90	23	135	2,105
Ohio River	....	....	....	....	....	....	....	....	....	....	....	....	....
Wheeling Term.	....	....	....	....	....	....	....	....	....	....	....	....	....
Lower C. L. & W.	354	484	579	729	1,162	1,416	897	1,300	1,963	*	434	684	10,002
Upper C. L. & W.	....	....	....	....	....	....	....	....	....	*	4	42	46
C. T. & V.	....	....	....	....	....	....	....	....	....	*	....	....	....
Newark	965	1,340	1,475	1,943	1,847	1,518	971	1,244	2,270	*	78	273	13,924
Total	2,118	2,588	3,226	3,855	4,908	4,452	3,262	3,884	6,302	998	1,940	2,443	39,976
Average per day, exclusive of Sundays and Legal Holidays	81	92	134	143	196	178	125	162	242	40	78	94	131

* Mines West of the Ohio River closed down April 1st, 1908, account of strike.

BOUND VERTICAL IN BOOK

Q. You have testified to the existence on the lines of the Baltimore and Ohio system of private and individual cars. What is the history of cars of that kind on the Baltimore and Ohio system? When did they first appear from the records of the Company, and what is the history as to them in the records of the company?

A. The first record of individual cars in the records of the company is in a resolution adopted by the directors in 1852, of which I submit a copy:

Resolution Adopted by the President and Directors of the Baltimore and Ohio Railroad Company on September 25, 1852.

"Whereas propositions have been made with the Baltimore and Ohio Railroad Company in reference to an immediate extension of their power applicable to the transportation of coal from Cumberland to Locust Point, of the gravest interest, not only to the business of the road, but the general trade of the City of Baltimore, in the establishment in connection with other improvements of a line of steam tugs and tow boats to ply regularly between this city and New York; and

131 "Whereas, the Select Committee appointed by the President under the authority of the Board of Trade have under consideration the general subject of the coal trade, and the various applications from coal companies and others referred to them for examination and report;

"*Resolved*, as the sense of this Board, That it is expedient on the completion of the Baltimore and Ohio Railroad to the Ohio River, and the arrangement which the Company will be called upon to make at that point, with the view to the accommodation of the general trade, to give such encouragement to the coal trade, as a distinct and independent business, as may be convenient and practicable to foster the claims of the City of Baltimore as the true point of shipment and distribution, for the products of the mineral region of the State of Maryland.

"*Resolved*, That in any future distribution among corporations of persons dealing in coal, to be made, of the power of this Comapny, all said parties shall be placed upon a footing of equality, upon some fair and equitable basis, to be established by this Company.

"*Resolved*, That the proposition of the Cumberland Coal and Iron Company to supply the capital for the immediate construction of as many coal hoppers as will give to said Company a regular transit of 60 per day, in addition to their regular apportionment, together with the requisite number of engines to keep said hoppers employed; the same to remain with this Company as a loan for the period of five years, interest to be paid semi-annually at the rate of six per cent. per annum, to the Cumberland Coal and Iron Company from the period of delivery of said cars and engines; said power to be appropriated as furnished, to the exclusive use of the said Cumberland Coal and Iron Company during the continuance of the proposed arrangement over and above the apportionment to which they may be justly entitled of the present or any additional power which the

Company may hereafter supply from their own means be, and the same is hereby accepted."

132 This resolution that I have here refers to cars for the Cumberland Coal and Iron Company. From that time, 1852, a large number of other individual companies put cars on the road, a number of them under contracts, running from 1857 down to 1899. The list I submit is as follows:

Since 1852 the following agreements similar to that with the Cumberland Coal and Iron Company have been entered into by The Baltimore and Ohio Railroad Company with the several Companies named. The last of these contracts terminated December 1, 1907.

American Coal Company	1857
The Swanton Coal Company	1857
Potomac Coal Company	1864
Black, Sheridan, Wilson Company	1890
Yough River Coal Company	1891
Consolidation Coal Company	1892
George's Creek Coal and Iron Company	1892
Columbus and Hocking Coal and Iron Company	1892
W. J. Chapman	1893
West Fairmont Coal and Coke Company	1895
Black, Sheridan, Wilson	1895
W. J. Chapman	1895
Merchants' Coal Company (two contracts)	1895
Gaston Gas Coal Company	1896
Montana Coal and Coke Company	1896
Consolidation Coal Company	1896
Consolidation Coal Company	1897
George's Creek Coal and Iron Company	1897
Consolidation Coal Company	1898
Gaston Gas Coal Company	1898
West Fairmont Coal and Coke Company	1898
Montana Coal and Coke Company (two contracts)	1899
West Fairmont Coal and Coke Company	1899
Monongah Coal and Coke Company	
Gaston Gas Coal Company	1899

133 Since 1899 the following individual coal cars have been put on the Baltimore and Ohio Railroad without any special contract, and have been run under substantially the same provisions as those under which all the individual cars in the country are operated, the practice in that regard being general and uniform. *a.* Pittsburg and Buffalo Coal Company, Rend Transportation Company, Westmoreland Coal Company, Wills Creek Company, H. E. Weaver, George's Creek Coal and Iron Company, Pittsburg Coal Company, Washington Coal and Coke Company, Quemahoning Coal Company, United Coal Company.

Since 1899 the cars which have come on the road, of which I also submit a list, have been without any contract rights, but have been handled generally in this same way, as were the cars handled under

contracts. All of the contracts however have now expired. The contracts had in them a provision, of which I will give a sample, covering the cars of the Gaston Gas and Coal Company. The provision is as follows:

"It is understood that this agreement shall not prevent the Gaston Gas and Coal Company from receiving from The Baltimore and Ohio Railroad Company, for the accommodation of the output of the mines of the Gaston Gas and Coal Company, a fair pro rata share of coal cars belonging to and distributed by The Baltimore and Ohio Railroad Company to other mines in the West Virginia district."

Now, that provision has been extended to these other companies who have put cars on our road more recently, although as I say, we have no contract relations. We are treating these cars exactly as we treated the cars that came on our line under these contracts.

Q. At no time since 1852, as I understand, has there been a period during which there were not cars of this class on the Baltimore and Ohio Railroad.

A. The records of the Company show that individual cars of this class have been constantly handled by The Baltimore and Ohio Railroad Company.

134 Q. And uniformly they have been handled as a distinct service from the service in the Baltimore and Ohio's own cars, substantially as provided in the resolution of 1852?

A. Yes, sir.

Q. Will you not state what legislation of Maryland there is affecting The Baltimore and Ohio Railroad Company in respect to these individual cars; also what legislation there is affecting the Baltimore and Ohio's lines in Pennsylvania, particularly the Pittsburg and Connellsville Company, whose line runs from Cumberland to Pittsburg.

A. In answer to your question, I submit the following:

Maryland Laws of 1878, Chapter 155, Section 5, Approved March 27, 1878.

SECTION 5. And be it enacted, That *is* shall be the duty of The Baltimore and Ohio Railroad Company, in consideration of the advantages accruing to it from this Act, to enter into an agreement under its corporate seal, it having first been duly authorized so to do by a general meeting of the stockholders of said company, duly called, in a form approved by the governor and attorney-general of this State, with the State of Maryland and the Chesapeake and Ohio Canal Company, whereby the said Baltimore and Ohio Railroad Company shall bind itself, its successors and assigns, to permit any railroad company now incorporated or to be hereafter incorporated under the laws of this State, to connect its rail road with the rail road or rail roads of said Baltimore and Ohio Railroad Company at any point at or near Cumberland, in this State, and also at any point west of Cumberland, on the line or lines of said Baltimore and Ohio Railroad Company within this State; the point or points of

junction to be designated by the rail road company or companies desiring to make such connection subject, however, to the approval of the board of public works of the State of Maryland, in case of any dissent on the part of said Baltimore and Ohio Railroad Company as to the point or points so designated; and the said Balti-
135 more and Ohio Rail Road Company shall also, in the contract aforesaid, bind itself, its successors and assigns, to receive and transport over its main stem and the branches thereof now constructed or hereafter to be constructed, and to deliver at the basins of the Chesapeake and Ohio Canal Company, at or near Cumberland, or within four miles thereof, on the line of the said Baltimore and Ohio Railroad, the points of delivery on said basins to be designated by the said Chesapeake and Ohio Canal Company, or by the shippers, all coal, lumber, pig iron, ores of all kinds and stone, intended for shipment on said Chesapeake and Ohio Canal, or for the use of the said Chesapeake and Ohio Canal Company, which may be offered to it at any point on its main stem or the branches thereof now constructed, or hereafter to be constructed, in bulk or in loaded cars, as the same may have been originally offered to said railroad company on its main stem or any branch thereof, as aforesaid, without reloading or reshipment, at a uniform rate of charge of two and one-half cents per ton of two thousand pounds, per mile, for tolls and transportation for all distances under twenty miles, counting west from the basins of the Chesapeake and Ohio Canal at Cumberland, Maryland; and that a uniform rate of one and three-fourths cents per ton of two thousand pounds per mile, for tolls and transportation for all distances exceeding twenty miles and not exceeding twenty-eight miles, counting west from the said basin at Cumberland, Maryland, and at the same rate from Piedmont station, on the said Baltimore and Ohio Railroad to the said basins at Cumberland, Maryland; and at a uniform rate of one and one-quarter cents per ton of two thousand pounds per mile, for tolls and transportation for all distances exceeding twenty-eight miles, counting west from the said basins at Cumberland, Maryland, and for all distances from points on the line of the Baltimore and Ohio Railroad west of said Piedmont station, which said respective rates shall be in full for all charges for tolls and transportation, and shall include all charges of said Baltimore and Ohio Railroad Company
136 for receiving, weighing and delivering said coal, lumber, pig iron, ores of all kinds and stone; but the shippers of such articles shall cause the same to be loaded on the cars at their own expense, and to return said cars in which coal, lumber, pig iron, ores of all kinds and stone have been loaded, after the same shall have been unloaded, free of charge, to the place or places where they were respectively received with reasonable dispatch, if so requested by the consignors of said coal, lumber, pig iron, ores of all kinds, and stone, or the owners of said cars; *Provided, however*, That when said coal, lumber, pig iron, ores of all kinds, and stone, are delivered to the said Baltimore and Ohio Railroad Company in cars belonging to any person, persons, corporation or corporations, such person or persons, corporation or corporations shall be entitled to and

receive from said Baltimore and Ohio Railroad Company, an allowance of one-fourth of one cent per ton of two thousand pounds per mile on the coal, lumber, pig iron, ores of all kinds, and stone, so transported on the main stem of said Baltimore and Ohio Railroad Company, or the branches thereof as aforesaid; and the said Baltimore and Ohio Railroad Company, in transporting said coal and other articles hereinbefore mentioned, shall use reasonable dispatch; and the cars containing the same shall be given the same facilities as cars composing other freight trains on the line of said railroad, and the said cars containing said coal, lumber, pig iron, ores of all kinds and stone, shall be unloaded by the Chesapeake and Ohio Canal Company, with reasonable dispatch, and said Baltimore and Ohio Railroad Company shall also, in the contract aforesaid, bind itself, its successors and assigns, to forward its cars from the main stem and branches thereof to any coal mine which may be on any lateral railroad now or hereafter connected with said main stem or branch thereof west of Cumberland, for the purpose of transporting coal and other articles hereinbefore mentioned in carloads over such lateral railroads, and over the said main stem and branches of said Baltimore and Ohio Railroad Company, to the said
137 basins of said Chesapeake and Ohio Canal Company and shall receive for the use of said cars on any such lateral road, the sum of one-half of one cent per ton of two thousand pounds per mile for the disfance said cars may pass over such lateral road or roads not belonging to said Baltimore and Ohio Railroad Company: *Provided*, That the rate hereinbefore prescribed to be agreed upon for the transportation of lumber intended for shipment on said canal, or for the use of said Canal Company, shall apply only to lumber which may be shipped from points on said main stem, not distant more than 60 miles westwardly from said canal basins at Cumberland; *Provided*, That nothing in this section, nor in the contract to be made thereunder, shall be deemed or taken to affect or limit the existing rights and privileges of the Baltimore and Ohio Railroad Company in reference to charges for tolls or transportation upon its road or branches, except insofar as they are especially limited by the provisions of this section, in the contract to be made thereunder; *Provided*, That nothing in this section contained, or in the contract to be made thereunder, shall be deemed or taken to apply to any railroads now operated by the Baltimore and Ohio Railroad Company under a contract or lease; and the said contract so to be entered into by the said Baltimore and Ohio Railroad Company shall provide that in case any disagreement shall arise between the parties to said contract as to the proper interpretation thereof, or as to the rights of any of the parties under said contract, a bill for the proper interpretation of said contracts in any particular and for the enforcement of the rights of any of the parties under said contract may at any time, and from time to time, be filed by any of the parties to said contract in the Circuit Court of any county in the State, or in the Circuit Court of Baltimore City; and enforcement and execution of any decree which may be passed in the premises

shall be had in the manner usual in such cases; and from any order or decree passed by any of said courts under any bill so filed, any of the parties to said contract may appeal to the Court of
138 Appeals in the manner provided by the general laws of the State regulating appeals from courts of equity.

An Act to Incorporate the Pittsburg and Connellsville Railroad Company, Sections 13 and 14, Penn. Act of April 3, 1837.

SEC. 13. On the completion of said railroad, or any portions thereof not less than ten miles, the same shall be esteemed a public highway, for the conveyance of passengers and the transportation of merchandise and commodities under such regulations as shall be prescribed by the directors; and it shall and may be lawful for said company to demand and receive such sum or sums of money for tolls of persons and property as they shall think from time to time reasonable; *Provided*, the toll on any species of property shall not exceed five cents per ton per mile; nor upon passengers not more than three cents each per mile; and it shall be further lawful for the President and Directors of said Company to prescribe the kind of carriages, wagons and conveyances which shall be used on said railroad for the transportation of persons and commodities and to adopt such regulations as to the transit of wagons and carriages on said road as may seem to them most conducive to the interest of the public and of persons using the same, and the Legislature reserves the right to reduce and regulate the tolls.

SEC. 14. The President and Directors shall have full power to purchase with the funds of said company and place on said railroad all machines, vehicles, carriages and teams of any kind whatsoever, which they may deem proper and necessary for the purposes of transportation, and that they may also, to any extent that they may deem advisable, transport all goods, wares, minerals and merchandise, or other articles that may be offered them for transportation, and all passengers wishing to be conveyed on their railroad,
139 and the said President and Directors may charge for toll and freight on all articles or passengers so conveyed by them, their officers and agents, not exceeding twice the rates granted in the preceding section of this Act for tolls alone: *Provided*, That if the said machines, wagons, vehicles, carriages and teams shall be so used on said railroad as to prevent or render unsafe the traveller upon any canal or public road now constructed or laid out, on or near the line of said railroad, the legislature may order and direct such rules and regulations for the said machines, wagons, vehicles, carriages and teams as will secure such travelling safe and uninterrupted, and if such travelling shall be unsafe and interrupted, the Court of Quarter Sessions of the respective counties through which the railroad shall pass may order and direct such rules and regulations until the legislature shall have acted thereupon.

Pennsylvania, Act of February 19, 1849, P. L. 79, Section 18.

SEC. 18. That upon the completion of any railroad authorized as aforesaid, the same shall be esteemed a public highway for the conveyance of passengers and the transportation of freight, subject to such rules and regulations, in relation to the same, as to the size and construction of wheels, cars and carriages, the weight of loads and all other matters and things connected with the use of said railroad, as the President and Directors may prescribe and direct; *Provided*, That the said company shall have the exclusive control of the motive power and may from time to time establish, demand and receive such rates of toll, or other compensation, for the use of such roads and of said motive power, and for the conveyance of passengers, the transportation of merchandise and commodities, and the cars or other vehicles conveying the same, or otherwise passing over or on the said railroad, as to the President and Directors shall seem reasonable; *Provided However Nevertheless*, That said rates of toll and motive power charges so to be established, demanded or received, when the cars used for such conveyance or transportation are owned or furnished by others, shall not exceed two and one-half cents per mile for each passenger, three cents per mile for each ton of two thousand pounds of freight, three cents per mile for each passenger or baggage car, and two cents per mile for each burden or freight car, every four wheels being computed a car; and in the transportation of passengers no charge shall be made to exceed three cents per mile for through passengers, and three and a half cents per mile for way passengers."

Q. Now, Mr. Hale, can you state whether or not the power and track facilities, and other facilities used in coal trade on the Baltimore and Ohio, have been provided in your time with reference to the total movement of cars for the traffic of the system, including the traffic in these individual cars and in these foreign railway fuel cars?

A. Yes, sir; the facilities have been provided to take care of the whole business.

Q. As a matter of fact, does the handling of these individual cars and foreign railway fuel cars affect the handling or movement of the bituminous coal in cars owned by the company?

A. No, it does not.

Q. What function do these individual cars fulfil in the coal trade?

A. The individual cars are uniformly provided by shippers to take care of their contracts in times of car shortage.

Q. You have testified that in winter the purchasers of coal under contract demand and take the full amount which they are entitled to take?

A. Yes, sir.

Q. And that creates a scarcity of coal?

A. Yes, sir; a scarcity of spot coal.

Q. And that scarcity, reacting through the price, starts up
141 operations in the coal regions and increases the demand for cars. It is to meet the shortages of that kind and enable them to carry out their contracts?

A. That is why they provide these cars; yes, sir.

Q. On your list there are some cars owned by the Maryland Steel Company and probably one or two other consumers.

A. One other consumer that owns a few cars.

Q. What functions do those cars perform?

A. Those cars—I speak of the Maryland Steel Company, which is the only material factor—were provided in order to enable coal shippers to make contracts with the Maryland Steel Company and fill them regularly. The Maryland Steel Company put them on in order to secure a regular supply of coal at a uniform price.

Q. That company is operating coke ovens, making coke for their steel works and gas which they sell to the gas company in Baltimore; is it not?

A. Yes, sir.

Q. And that required a steady supply of a proper grade of coal; is that a fact?

A. That is a fact. I would like to change that answer of mine. The Maryland Steel Company puts their cars in to get a regular supply of the same coal at uniform prices. If they change the quality of their coal they change the quality of their by-products in their coke ovens and therefore they have to have the same kind of coal.

Q. How is it these foreign railway fuel cars get onto the road; what is the reason for them?

A. The foreign railroad companies send these for their own coal in order that they can receive a regular supply of coal to run their railroads with, and to get that coal at a uniform price.

Q. As a rule, is that coal purchased f. o. b. cars at the mines?

A. That is my understanding, that it is generally purchased f. o. b. cars at the mines. In some cases it is purchased f. o. b. cars at certain junction points of the railroad.

142 Q. Suppose a prohibition was made on special consignment of those cars?

A. Why then, in time there would not be any of them. The regularity of supply of coal is the chief thing that is needed. The amounts we pay for the use of those cars are not sufficient to keep them in repair and to pay interest on the investment.

Q. You are speaking now of private cars?

A. Of private cars and also of foreign cars. We are paying only 25 cents a day for the foreign cars, and six mills a mile for the others. There would not be a sufficient object for the individual to supply any cars, and there would not be any object for the foreign railroads to send its cars on the lines. The originating road is hard enough put to it now to get enough cars to handle its own business.

As I have shown, in times of stress the cars leave the line of the originating road, and the distributing road holds onto them, and this foreign fuel arrangement is one rather feeble recourse we have

in cases of that kind to get the distributing road to provide a portion of the equipment. The reason the foreign railroad would not send its cars on is this. They get a concession in the price because they furnish this regular supply of cars, which is exceptional and does not go into the distribution. Unless they got this concession in price they would not supply the cars, and we would not get the cars; and it would be a reduction in our car supply to that extent. The only advantage an individual gets out of this car is this. In a time of shortage he can come somewhere near filling his contracts, and does not have to buy spot coal at high prices to fill his contracts at low prices. That is why they supply these cars. They do not need them seven or eight months in the year, and they lose money on them as a movement proposition; but they supply them just to tide over those four or five months when they would get stuck and have to buy high priced coal to fill low priced contracts. If those cars were not an exceptional and an additional supply, why
143 they would not supply them; and it would simply reduce the car supply for the originating roads, and make the coal car shortages worse than they are.

Q. In paragraph 7 of the answer of the Commission in this cause, Section (*a*), there is a statement with respect to the railroad company's method of rating mines, which is substantially the same statement you have made, namely, that rating is made first on physical capacity, and second on commercial capacity. Then follows this statement:

"The larger the number of cars assigned to a mine, the greater will be the stimulus for development or increased production, as well as the greater the capacity of the mine for actual shipments. The methods therefore of rating mines based on previous actual shipments as a predominating factor, taken in connection with the allotment to certain mines of foreign railway fuel cars and private cars, increases the rating of such mines and gives them larger percentages of cars in the general distribution during periods of car shortage not only than they would otherwise receive, but also than are received by other operators with mines of equal physical capacity to whom such cars are not assigned. The supply of car equipment of such favored mines is thus increased both by the actual number of foreign railway fuel cars and private cars assigned to them and also by the increased ratings resulting from such assignments."

Do you understand that to be a correct inference or conclusion from the facts, and if not, wherein lies the mistake?

A. I should say that was an incorrect conclusion. The percentage so far as based on commercial capacity is influenced only by the period when there is a free car supply; and when these exceptional allotments are unnecessary, and do not count. As far as the physical capacity is concerned, that is something which is absolutely up to the mine operator. If he wants to develop his mine and will spend enough money on it, he is always provided with enough cars to develop it. I can enlarge upon that point if you like. But I would be

perfectly safe in saying that there is no mine on the B. & O.
144 Railroad which has not a car supply sufficient to make a very satisfactory development, if they would only use the cars for development.

Q. In the same paragraph of the answer, under (*c*), there is this statement:

"As between mines of equal physical capacities, the amount of their respective commercial outputs or shipments is limited by car supply. The greater the car supply the greater will be the output, and the greater the output the less the cost of production per ton. The operator therefore having the advantage in car supply, can make greater profits on his coal or undersell his competitors."

Is that statement the truth or the whole truth?

A. I do not quite understand it. He says, the operator having an advantage; which operator has an advantage?

Q. Read it. (Handing brief to witness.)

A. (Reading:) "As between mines of equal physical capacity, the amount of their respective commercial outputs or shipments is limited by car supply"——

Well, I would like to state there that that is correct, but the car supply is only one limitation; there are a great many other limitations.

(Reading:) "The greater the car supply the greater will be the output,"——

Well, that may or may not be the case.

(Reading:) "And the greater the output the less the cost of production per ton."——

That is generally the case, but not always the case.

(Reading:) "The operator therefore having the advantage in car supply can make greater profits on his coal or undersell his competitors."——

Yes, but an operator who has any other advantage can do so too.

Q. Is it a fact that the output or shipment is limited by car supply, that that is a real determined fact?

145 A. That is only one of a number of other facts. Of course that is true in that no one can ship more coal than he has cars for. Anybody will admit that, but that is about as far as that is true, it seems to me.

Q. In how many years do the shipments in the summer months equal the full amount which the Baltimore and Ohio Railroad Company could transport and could furnish cars for?

A. Why, I have never known that to happen. It came nearer happening in 1907 than at any other time; but we could have handled more coal if it had been offered to us in the summer of 1907.

Q. So that at any rate during that period the car supply did not limit the output, did it?

A. The car supply did not entirely limit it in the summer of 1907, and there is no other summer, unless we go back to 1903, where the car supply in summer had anything to do with the output, because we have always had cars ahead.

Q. In the same paragraph, under H, there is this statement:

"The said 'Foreign railway fuel' cars and 'Private' cars occupy

the tracks and sideways of the complainant, are drawn by its locomotives, operated by its employees, and must lessen the facilities in those respects of mine operators to whom they are not assigned, and should therefore be counted or taken into account in determining the pro rata share in the general coal car distribution of the operators to whom they are assigned."

Is it a fact that the operations or handling of the foreign railway fuel and private cars must lessen the facilities in those respects of the mine operators to whom they are not assigned?

A. It is not.

Q. Assume now that these private cars you have testified to, and these foreign railway fuel cars, during the period of the last four years had not been on the line of the Baltimore and Ohio at all, would the mine operators, who did not own those cars and to whom none of them were assigned, have received any greater car
146 supply or enjoyed any greater facilities in the absence of those cars than they did while they were on the lines?

A. I think not.

Before the Interstate Commerce Commission.

No. 54, Equity Docket F.

THE BALTIMORE AND OHIO RAILROAD
v.
INTERSTATE COMMERCE COMMISSION.

WASHINGTON, D. C., *December* 5, 1908—10 o'clock a. m.

Met pursuant to notice.

Appearances.

On behalf of the complainant, Mr. Hugh L. Bond and Mr. Irvine Cross.

On behalf of the defendant, Luther M. Walter, Esq.

ARTHUR HALE resumed the stand for further direct examination.

By Mr. BOND:

Q. Mr. Hale, in your previous examination, you testified as follows:

"I should say we were able to fill our orders 75 per cent. of the days of the year."

I understand you wish to explain more definitely that statement?

147 A. When I speak of orders, in that connection, I refer to genuine orders, or what might be called the requirements of the trade. As I have explained, during seasons of car shortage the consumers of coal frequently contract for more than they actually need, and with more than one shipper, so that the orders which we actually receive are frequently duplicated. I mean that if those

duplications were eliminated, we had, in my opinion, filled all of the genuine orders fully 75 per cent. of the days in the year.

Q. The word "orders" has a technical meaning in this connection, has it not?

A. We use the word, "order" to signify the number of cars which the shippers asked us to give them.

Q. Are many of those orders permanent orders, so to speak?

A. The orders are frequently made from day to day; but we insist on having an order for each day.

Q. The order of a mine, represents the hope of the operator as to what he can ship. Is not that about a fair statement?

A. Yes; admitting that the hope is frequently an exaggeration.

Q. How do the orders compare with the actual shipment?

A. The orders are always larger than the actual shipments.

Q. How do the orders compare with the theoretical capacity of the mine, to which you have testified as one of the factors in reaching percentages?

A. The orders on an average run less than 50 per cent. of the physical capacity of the mine, and sometimes much less than 50 per cent. The only cases where the orders in any way approach the physical capacity of the mine are cases where the mines put two men into a working place. There are also cases where mines work double turns. In some such cases I have known the orders for particular mines to exceed the physical capacity of the mine; but generally speaking the orders for cars, in winter time, on the Baltimore and Ohio road, average something like 50 per cent. of the physical capacity of the mines, and in the summer time about 40 per cent.

148 Q. Do you mean the actual orders, put in by the operators?

A. This refers to actual orders put in by the operators, including all the duplications, which I have alluded to above.

Q. When we adjourned on October 28th, you were being examined as to individual cars. Will you state whether those cars are run on the same terms for all owners, and whether or not it is open to anyone to have such cars run?

A. Yes; such cars are run on exactly the same terms. Anyone offering an individual car can have it run on the same terms as others of the same class. If you will say "coal cars" I can strike out the word "class."

Q. One of the statements you filed shows shipments in box cars amounting, for the year 1908, to some 7,700 cars. Does the system of percentage distribution, to which you have testified, apply to those box cars?

A. No; it has not applied to those box cars for a number of years. If, at any time, the supply of box cars should be so short that we could not, substantially, fill orders, we would make another set of percentages applied to mines equipped for loading box cars.

Q. What do you mean by "equipped for loading box cars"?

A. The chutes at coal mines, are ordinarily arranged for filling open cars, from the top, and those ordinary chutes cannot advantageously be used for the loading of box cars, which have to be loaded

from the side. It is practicable to direct a chute so as to throw the coal on the floor of the box car through the door; but to load a car to the required minimum would necessitate a great deal of expensive work, in shoveling the coal to the ends of the car. It is therefore usual for mines to equip themselves with what are called box car loaders, which cost from $1,000 to $3,000 to install. Those machines throw the coal into the ends of the cars, thus doing away with the expense entailed by throwing the coal by means of shovels. Practically all box cars which we load with coal, are loaded with box car loaders.

149 Q. The distribution of box cars, then, is to mines equipped with box car loaders, practically?

A. Practically; yes.

Q. And therefore the box cars are not treated as available cars for distribution, on your general percentages, which apply to mines?

A. They are not.

Q. No deduction is made from the percentages of mines having box car loaders and loading box cars, because of that fact?

A. No.

Q. You have testified that the distribution of empty cars to the mines is made daily by divisions, from assembling yards by so-called coal engines, which place the empties and bring back the loads. Is this movement included in your "Statement G," showing the average movement of loads, the mileage of cars and so forth?

A. No; the movement of those coal engines is considered a local movement, and the figures on Statement G, are on cars in through freight trains.

Q. And the figures for locomotives are locomotives employed in hauling through freight trains?

A. Yes; if an engine is not used in through freight service on a particular day, it is not counted in the statement, of which Statement G is a recapitulation.

Q. This movement between yards and mines made by these coal engines, and made possibly, at times, by local train service, is a switching service, distinct from the road service shown by your Statement G.

A. Yes.

Q. In respect of the switching movement between the yards and the mines, would it not be possible that individual cars, or specially consigned cars might interfere with the movement of cars available for general distribution on percentage?

150 A. No more than any other cars. The engines are assigned to this coal service, with the intention of taking care of the whole business, no matter what kind of cars are used.

Q. Would it be possible to obviate any possible interference, by making a rule that system cars, or cars generally available for distribution on percentage, be given the preference in that switching movement?

A. I should consider it very impracticable. It would be very expensive to attempt to carry it out, in the first place. Any division of the work, in that way, would necessitate extra engines and men.

I should call it decidedly impractical, and it is a method of doing business for which the road is not prepared or equipped.

Q. Could any interruption or any interference in the movement of cars in this switching service produce any effect that would be more than temporary?

A. No.

Q. Could it produce a car shortage?

A. No.

Q. Why?

A. Because interference with switching service is almost always temporary and local. We take great pains to provide sufficient switching coal engines. They are generally worked only by day; but in emergencies we can work them at night as well. For this reason the switching movement is generally comparatively regular.

Q. In the through movement of cars, shown on Statement G, how do the cars move; that is, what is the make up of the trains, and so forth?

A. The cars are moved on through freight trains to various places. There are four general classes. The distinctly fast freight trains, the time freight trains, the ordinary freight, and the locals. The locals, however, are not shown on this particular statement. On the main line divisions there are two and generally three classes of freight trains. They are made up at each yard for different
151 destinations. Each yard makes up from two to six or eight classes of trains. The movements are from 63 different points on our lines.

Q. The cars shown on your Statement G, as left over in yards, are cars in the process of classification, and of making up into trains?

A. Those cars are cars that happen to be standing in those 63 yards, in the process of being classified or made up into trains.

Q. Standing when?

A. At midnight.

Q. When cars go out of yards in these classified trains, they move in what would be called the general current of traffic. Is that correct?

A. Yes; the road traffic, and they are accounted for in that column headed "Cars moved."

Q. Does the Baltimore and Ohio Railroad, and all other railroads with which you are acquainted, receive from their connections and handle cars loaded with coal and empties, including as well individual cars as cars belonging to the railroad companies?

A. Yes.

Q. And do they return those cars, when empty, to the road from which they receive them?

A. Yes; they return them when they are unloaded.

Q. Do the same roads, generally, receive and handle cars belonging to individuals which are loaded for points on their line with commodities other than coal?

A. Yes.

Q. And all the cars so received are handled in these classified

trains which you speak of, as being made up in the yards and moving on the main line of the road?

A. Yes.

Q. In that through movement would an individual car, loaded on the Baltimore and Ohio lines, be distinguishable, in the service performed, or its effect on the movement of other cars, from any similar car loaded on connecting lines?

152 A. No. The men arranging for the movement would probably not know whether the cars were individual or not. They would know, in a general way, the commodity and the destination of the freight.

Q. The pay for the service received by the railroad company is based on the tonnage of the commodity in the car; is it not?

A. Yes, the rate is exactly the same.

Q. In respect to coal, the rate is the same per ton whether the coal is loaded in an individual car or loaded in a Baltimore and Ohio car?

A. Yes.

Q. How is it, as to cost to the shipper who owns an individual car; is the cost greater or less?

A. The owner of an individual coal car receives from the railroad six mills per mile for the use of the car; and it has been found that the receipts from this source are not sufficient to compensate the car owner for the interest on his investment, the repairs to the car and the amount which should be set aside for depreciation.

Q. So that, in that sense, the cost to the owner of the individual car is greater.

A. Yes; to the owner of individual coal cars.

Q. You testified that individual coal cars are uniformly provided by shippers, to take care of their products in time of car shortage. Could not the same purpose be accomplished by shipping coal in the summer, when cars are plenty, and by storing it against the winter months?

A. It has not been found practicable to store bituminous coal, in general.

Q. Can you state why?

A. Because it is too expensive. Bituminous coal depreciates when exposed to the weather and is apt to catch fire by spontaneous combustion, and as the result of the two causes, bituminous coal,

153 as a matter of fact, is not stored, except when it becomes absolutely necessary. It has to be stored, to a certain extent, at points where it is transshipped from boats to cars, as at the ports at the head of the Lakes. A number of manufacturers there have storage for coal under cover; but that is a comparatively small amount. With the exception of those points where coal is transshipped from boats to cars, there is hardly any bituminous coal stored by dealers.

Q. Where it is stored in large quantities, how is spontaneous combustion guarded against?

A. It is usually not practicable to cover this coal, because the cover interferes with the handling machinery, and the only method for

guarding against combustion is by arranging for ventilation of the lower part of the coal. When the coal does catch on fire they have to dig into the pile and throw away the coal that is on fire. Where the coal catches on fire in a boat, as has happened in New York City, where they have attempted to store in boats, the whole cargo is practically lost.

Q. Am I right in understanding that it is not a physical impossibility to store bituminous coal, but that the expense of it is so great as to limit the storage of it to a few cases?

A. That is quite correct.

Q. Where storage is provided, it does accomplish, as I understand, the purposes for which you say the individual car is specially provided?

A. Yes; but in the anthracite coa[illegible]de, where coal is very largely stored, those individual cars have not been found necessary.

Q. Has there been any mine on the Baltimore and Ohio lines that shipped exclusively in individual cars, or in specially consigned cars?

A. Yes; I can recall a case of a mine which shipped foreign fuel coal in foreign cars almost exclusively for a considerable period of time. I recall another case where a mine used individual cars exclusively for a very considerable period, and a couple of other
154 cases where mines used individual cars almost exclusively.

Q. There are many commodities that cannot be transferred between the point of shipment and the point of delivery?

A. Quite a number of commodities, it is not practical to transfer.

Q. Is bituminous coal one of them?

A. Bituminous coal is one of them.

Q. Then a car in which bituminous coal is loaded has to go through to destination; is that correct?

A. Yes; in practice.

Q. In case of a through route, with another carrier or carriers, in the shipment from points on the Baltimore and Ohio line over that through route, what is the condition of that car when it reaches the end of the through route and is unloaded; in whose control is it?

A. It is in the control of the railroad on which it has been unloaded.

Q. Can that line use that car?

A. Yes.

Q. What compensation does that line pay for such use?

A. Supposing it to be a railroad car, it pays 25 cents a day.

Q. Is the sum of 25 cents a day a sum which equals the cost of that car to the owner?

A. No.

Q. Then is it true that to-day it is more economical for a road to use other roads' cars than to own its own?

A. It is.

Q. Is there any enforceable contract, or any contract at all, that insures the prompt return of its cars?

A. No; under the per diem rules agreement the owner of a car has a right to demand its return, but there is no penalty provided in case that demand is not observed.

Q. Is it or is it not a fact that there is a large number of
155 roads in the country that habitually use the cars of other railroads to transact their business, carry their traffic, and are car borrowers habitually?

A. Yes.

Q. The difference between a car owner and a car borrower is that the borrower has habitually more foreign cars on its lines than it has of its own cars on foreign roads, and the car owner has more of its cars on foreign roads than it has of foreign cars on its lines. That is the distinction, is it not?

A. That is the distinction we make.

Q. And is it not a fact that the car borrowing roads will not voluntarily pay a higher per diem for the use of cars, or enter into any enforceable agreement to enable the car owning roads to secure the prompt return of their cars.

A. You had the word "voluntarily" in there, did you not? Yes; that is a fact.

Q. Is there any method of coercing those roads except to cut off the traffic?

A. None has been found.

Q. Withdrawal of traffic would necessitate the withdrawal of through routes, and the stopping of interchange, would it not?

A. Yes.

Q. In order to coerce a borrowing road, that stoppage must be concurrent by all competing lines connecting with that road, must it not?

A. Yes, indeed.

Q. Under the law, how would you make an agreement between competing lines to take that concurrent action?

A. I would not dare make an agreement.

Q. You have testified, and the statements you have filed show, that in the years 1906 and 1907 the 10,000 new cars purchased by The Baltimore and Ohio Railroad Company in the winter of 1905-1906 went onto the line of other railroads and were there detained, and that the balance of B. & O. cars on foreign roads over
156 foreign cars on B. &. O. roads increased during those years by the full number of 10,000 cars?

A. Yes; the balance against us increased by a number of cars equivalent to additions to our equipment. It was not exactly the 10,000 cars that we acquired that went away, but an equivalent number.

Q. In your experience in railroad operation under existing rules and laws, was there and is there any method by which The Baltimore and Ohio Railroad Company could have prevented, or could now prevent the loss of the use of its cars as shown in the above question?

A. I know of no method.

Q. The number of cars which your connecting roads will return is measured by the needs of those roads, is it not?

A. Yes.

Q. Has The Baltimore and Ohio Railroad Company any means

of measuring the needs of those roads, so as to know how many cars they will detain?

A. Nothing except experience.

Q. Experience would seem to apply only to commercial conditions theretofore existing. Had there ever been an experience of the detention of so many cars as in the years 1906 and 1907?

A. Not to my knowledge. That was the extreme case, so far as I know, up to that time.

Q. Should the Baltimore and Ohio Railroad purchase as many more cars, or any number of cars, would there be any assurance that those cars would be available for shipments originating on the Baltimore and Ohio Railroad?

A. No.

157 Cross-examination.

By Mr. WALTER:

Q. So far as these tables are concerned, Mr. Hale, can you testify as to their being literally true, further than that they were made in the ordinary course of business and under instructions by you?

A. No.

Q. As to the orders embraced in the first question to you this morning, have you any manner of system by which you can determine whether there is a duplication of orders?

A. No.

Q. In other words, do you know whether the shipper has asked for two cars when he can sell only one?

A. I did not mean to imply that the shipper asks for two cars when he himself can only sell one. I intended to say that two shippers would ask for cars to fill the same order. Now, there is no way in which we can detect that. The only way I know that is, that in general in talking to consignees, they have admitted to me that they have ordered the same coal twice, practically. Furthermore, I have frequently been able to fill a very large shortage by running in a comparatively small number of cars.

Q. Have you any means of determining how extensive, that is, what proportion of the whole, these excess orders are to the total number of cars representing real sales?

A. No, excepting that when the price of coal is steady I consider it fair to assume that the difference between the number of cars ordered and the number of cars actually loaded is a duplication of orders.

Q. You are not able to determine, nor do you make any effort to ascertain, whether the miner who asks for a car to load tomorrow, has really sold that load of coal?

158 A. No; we make no such effort, except that we require a mine owner to say in a general way where his coal is going.

Q. Do you make any inquiry, and if you ascertained it to be the fact that a man was simply sending his coal to Washington, for instance, to be disposed of there if he could find a buyer, would that

make any difference in furnishing him a car, whether he had sold it or not?

A. No.

Q. Now, as to these individual cars, no motive power is furnished by any mine owner?

A. No.

Q. To carry cars from the distribution yards to the mine?

A. No.

Q. Nor to take the loaded cars to the yards, for putting in train movement?

A. No.

Q. The box cars you spoke of, how extensively are they used for the loading of coal?

A. There were about 7,000 cars loaded last year.

Q. How many mines participated in the use of those 7,000 cars?

A. A comparatively small number.

Q. Of those mines using box cars, all of them participated in the distribution of cars without reference to the number of box cars they used?

A. Yes.

Q. Was any restriction made in the furnishing of box cars ordered by mines?

A. No, further than that on occasions we could not promptly fill all box car orders, but we have always been able to make up shortages on box cars.

Q. Did the B. and O. Railroad Company refuse any mine box cars for loading when requested?

A. No.

Q. Without regard to the amount asked for?

159 A. No, excepting that there have been occasions when mines failed to load cars, and we have refused to fill their orders the next day, and in cases where mines loaded cars and failed to give destination for the coal, in such cases we refused to fill all orders, including box car orders.

Q. Then, box cars were subject to the rules of distribution to some extent; that is, unless the man gave the destination of the coal in the cars, you would not furnish him any cars?

A. We would not furnish him any more cars.

Q. Any more cars than he had?

A. That is so; yes.

Q. In determining the number of cars in a yard at midnight, as referred to in Statement G, you do not count the empty cars?

A. Yes; but they are not shown on that statement. Those are loads.

Q. If you had on your line a car balance in your favor, would there be any difficulty at all in complying with the order of the Commission, that is, counting all cars of whatever nature in the distribution?

A. I don't quite understand what you mean by difficulty, sir. Do you mean could we fill all orders?

Q. Yes.

A. I think we could.

Q. The car balance being against you is the chief, almost the whole, reason why a change in your car distribution would bear harshly upon you—I mean upon the railroad company. Does it make any difference to the railroad company?

A. Excuse me again. The various difficulties which I have spoken of are very largely based on our having a deficit if we compare the number of foreign cars on our road with our cars on foreign roads.

Q. Who makes the rules?

A. For distribution?

Q. No; for the return of foreign cars to the owning road?

160 A. The American Railway Association.

Q. That is purely a voluntary association?

A. Purely.

Q. Are its rules determinable by vote, based upon the number of cars owned by the individual members?

A. Let me explain that there is what is known as the per diem rules agreement, which has been signed by most of the railroads, including all the members of the American Railway Association, and these rules for the return of cars are part of the agreement, as I have testified.

Now answering that second question, the per diem rules agreement was adopted and all important changes in the rules are made by letter ballot, on receiving a majority of the votes of the members of the American Railway Association, controlling two-thirds of the number of cars owned by the members of the American Railway Association. The memberships in the American Railway Association are to a certain extent dependent upon the mileage. That is, any member who has less than 2,000 miles has one vote. A member who has 2,000 miles may have two memberships, and so on.

Q. Is there any voting basis calculated upon the number of cars owned?

A. Yes; as I say, the adoption of the per diem rules and changes in the per diem rules have been made on the basis of two-thirds of the number of cars owned.

Q. Two-thirds of the cars owned?

A. Owned.

Q. Is it not clearly, then, within the power of the car owners to make such rules as will protect their interests in the cars as against the use of the cars without proper compensation by non-owners?

A. No, because any member of the per diem rules agreement can withdraw on three months' notice.

Q. Now, 25 cents is the value, or rather is the amount received by the owner for the absence of a car on other lines up to thirty days. Is that right?

161 A. Indefinitely, now.

Q. Is there any penalty for keeping the car beyond thirty days?

A. Not now.

Q. There was formerly a charge of $1 per day, was there not?

A. Yes; up to July 1st, 1907.

Q. A year ago last July?

A. A year ago last July.

Q. Was not the operation of that $1 charge such as to cause a speedier return of the cars to the owners?

A. That is a mooted point. Everyone agrees that the operation of that $1 charge resulted in the holding railroad reporting the car as delivered to another. Now, sometimes it was delivered to the owning road. Sometimes it was delivered to a rival road. Sometimes it was an error in the report. In other words, the system was faulty in that there was no penalty for the diverting of a car to a road that was not on the home route.

Q. What sum fairly represents the average value of 24 hours' use of the average coal car?

A. I have no figures to show the average earnings of coal cars, but during the year 1907 when the cars of the country were fully occupied, the average earnings of each freight car per day were about $2.50. They are less now, because so many cars are idle. But when you deduct the idle cars, the earnings come pretty near that figure.

Q. Does that statement of the average earnings embrace the revenue, or is it the net earning over and above the cost of hauling the traffic?

A. That is the total revenue.

Q. What proportion of that would be consumed in paying for the service rendered by the carrier in hauling the traffic?

A. The ratio of expense to earnings varies very considerably, but assuming a 66 per cent. ratio, the net earnings of a car at $2.50 would be 83 cents a day.

162 Q. Would 83 cents per day cause the cars to come back?

A. I think it would. It was rather with that in view they placed the penalty rate at a dollar, thinking that that would move the cars.

Q. If all reports were honestly made, and the cars moved with a view to complying with the agreement, cars would return under the dollar charge?

A. I think so.

Q. And if your ten thousand cars, taking that roughly as the car balance against you, were with you, would there be any car shortage on your lines at all in the coal service?

A. That depends largely on the condition of our competitors. It might happen that if they were not equipped to do their share of the business, a larger share might be thrown over to us, and we might still be short some cars; but supposing that we had our deficit in cars with us, and the other railroads in our same position had their deficit with them, there would be, in my opinion, no car shortage. Let me add to that, this. Supposing that the individual coal cars are still where they are, for they are an important element in the situation.

Q. Can any mine owner, without an O. K. from your carrier, put in use private cars?

A. Yes, sir.

Q. Without reference to the number?

A. Yes.

Q. Or the purpose of use?

A. Yes.

Q. In the car balance and the various tables as to cars, do you include all freight cars, or coal freight cars only?

A. There is a distinction made. You will find some showing all cars and some showing coal cars.

Q. Unless there is a statement that there are coal cars only, they include all cars?

A. They include all cars.

Q. In switching cars from the distributing yards out to
163 the coal mines, the engine which does that service, if it has no private cars to handle, could in times of shortage of motive power, distribute cars which come under the rules for car distribution without any failure to give each mine its proper share. Is that true?

A. Well, does that admit that there is a shortage of motive power? I will say yes to that, of course.

Q. In distribution yards where the track space is limited, cars could be put in trains and taken out of trains with greater dispatch if there were no private cars, to the extent that the private cars make up the total, is not that true?

A. I will answer that yes, but I would like to explain that when I answer yes, I answer to cover the dispatch not only in that yard, but on the road. In general, the smaller a yard, the quicker the work has to be done in that yard, and the delay caused by a small yard, is not in that yard, but is somewhere else.

Q. I don't understand that.

A. You can see that water runs much quicker through the small end of a funnel than through the large end of a funnel. So the delay is not at the congested point. A congested point makes delay at other points.

Q. I am speaking now of the distribution yard, in making up the cars there to go out to the mines which are fed by that yard. If the private cars were not handled out of that yard, you could take the available cars to the mines and distribute them with greater dispatch, and keep the line open to a greater extent than when the private cars are there?

A. As I said in my explanation of the answer, yes, but the delay to which you refer does not happen to be in the small yard.

Q. Put the matter in this way. The mine owner gets his cars quicker and with greater regularity if there were no private cars to take out of the distributing yard and drop along the line?
164 A. In cases where there is any point where we have insufficient facilities, we can handle a small business quicker than a large business; yes, sir.

Q. None of your statements in your direct examination as to car

movements apply to local trains or to the movement of empties to the mines along the main line, or loaded cars from the mines, until those cars are placed in through trains?

A. I think the Statement G is the only one that gives those figures, and that applies only to loads in through movement.

Q. Does delay occur more in the preparation and making up of trains, in the placing of empties and in the placing of loaded cars, or is it after the train is made up, when the train has become a through train?

A. The greatest delay to a coal car is after the train arrives at its destination.

Q. At the end of the route?

A. Yes, sir.

Q. Its detention by the consignee?

A. Well, the total detention at terminals is the great detention. Part of that is rail detention and part of it is consignee's detention.

Q. What proportion of your motive power is engaged in the movement of trains as compared with the total motive power?

A. You are eliminating passenger business?

Q. Yes; I am speaking now only of freight, the percentage of freight in the movement of trains as compared with the total freight power?

A. I wish I could have prepared a statement of that, but in general I would say that decidedly less than half of the power can be engaged in through freight service, the rest being taken for the local and switching and so on.

Q. What proportion of your motive power, compared to the total freight motive power, is exclusively used in the distribution of empty cars and the gathering up of the loaded coal cars?

165 A. I would rather not make a guess at that, but I could have those averages made up for you very readily.

Q. Could you give a sort of a rough estimate, so as to get the matter out of our minds?

A. Well, even on the coal divisions it varies very much, but on a distinctively coal division those engines must run up to 50 per cent., or even more.

Q. Is the average much above ten to twenty per cent., taking your coal divisions as a whole?

A. My guess would be about thirty per cent., taking the coal divisions as a whole. Hold on a minute. Some of them do a very large through business. I should say thirty, but it is a mere guess.

Q. Now, as to the purchase of your coal. Does the company, for its use, buy coal from all the mines?

A. No.

Q. Do you mine any coal for your own use?

A. No.

Q. Do you have any interest, direct or indirect, in any coal companies to-day?

A. Not to my knowledge.

Q. Do all coal car owners—and by the term owners I mean the

mines that use the private cars—have the same rate on the use of the car by you in hauling the traffic?

A. The same six mill per mile rate, yes.

Q. Without regard to the character of the coal car or its cost?

A. Without any regard to that; yes.

Q. Since the order of the Commission in this case went into effect, has there been any car shortage?

A. No.

Q. Do any of these statements show the ownership and extent of private cars in the coal trade?

A. Yes; we have given the information we have on that.

Q. In these statements?

A. Yes.

166 Q. Has there been any increase in private car ownership and use in the last year

A. No.

Q. Has there been any decrease?

A. Within the last year; yes.

Mr. CROSS: Are you asking as to one road or as to the roads of the country?

Mr. WALTER: I am referring only to The Baltimore and Ohio Railroad Company.

By Mr. WALTER:

Q. In the tables which give coal car tonnage and the number of cars loaded with coal unless otherwise stated, it does not include box cars loaded at these special mines with special facilities?

A. I am not really certain whether in the figures of cars delivered, those box cars were included or not?

Mr. BOND: I think they were all shown in a separate table.

A. They were shown in a separate table, but whether they were included in the total—I think they are. In the number of cars loaded, I think they are included.

Q. In speaking of foreign railroad cars, do you include all sorts of cars which are loaded with coal?

A. When I speak of foreign fuel railroad cars, I refer only to the cars that are especially consigned to us to be loaded with coal for the use of the owner of the car, and they are usually open top cars, gondolas or hoppers.

Q. Have you made any restrictions upon what mines should put in these machines for loading box cars?

A. No; we have encouraged it as far as we could.

167 Redirect examination.

By Mr. BOND:

Q. In supplying the requirements of a mine for cars, it is necessary is it not, that you should know in a general way the destination of the shipments, in order to tell what cars are available to put to that mine?

A. Yes.

Q. Am I correct in saying that while you have spoken of cars available for distribution on percentage as including all cars owned by the Baltimore and Ohio Railroad, and all foreign cars which can be loaded with coal, yet those cars are not available indiscriminately for shipment to any destination?

A. No; under the rule the foreign railroad cars which we have on the line which are not especially consigned for the foreign fuel are put into the regular distribution, but we insist on their being loaded in the direction of home.

Q. And to do that you must know in a general way from the mine in what direction their shipments are going?

A. We insist that the orders indicate enough to us to know what foreign cars we can put in.

Q. You get, do you not, large numbers of empty coal cars from the Philadelphia and Reading Railroad, on whose lines much of the Baltimore and Ohio coal finds its destination?

A. Yes.

Q. They put those cars in, as a participant in the through route?

A. Yes, sir.

Q. And you have to treat those cars as in a way assigned to that through route, where they are especially put in, do you?

A. We take those cars on the distinct understanding that they are to be loaded back to the Reading road, and we order them
168 from the Reading in volume sufficient to fill the orders which we anticipate from our coal shippers for loading cars on the divisions from which this coal comes. That is one of the things that the shippers have to tell us. They want so many B. and O. cars for East, so many for West, so many cars for Reading points. These cars do not go to all our divisions, but on each division there is a separate arrangement which we make with the operators, to indicate to what points their coal is going.

Q. The order of the Commission in this matter, Mr. Hale, applies only to distribution when the mines are on percentage, that is, when there is a shortage, and you are distributing on percentage. Has there been such an occasion since the order was put into effect on the first of October?

A. No.

Q. The operation of the company in distributing these cars, then, as a practical matter, has not been affected by the order up to this time?

A. No.

Q. The company is still handling, distributing individual cars, foreign railway fuel cars and consumers' cars?

A. Yes.

Q. As well as its own cars?

A. Yes.

Q. In doing that it employs the switching engines and these delivery yards, does it not?

A. Yes.

Q. Have you been able to distribute, with those engines, and with those yards, all the cars, both B. and O. cars and individual cars?

A. Yes.

Q. In times of car shortage, when you distribute on percentage, and when the order of the Commission in this matter becomes effective, will the total number of cars handled by these switching engines and through these yards be greater or less than in
169 times when there is no percentage in effect and when this order is not enforced?

A. Experience would seem to show that it will run about the same. I do not anticipate any great change.

Q. Is the number of cars distributed in times of shortage greater to any considerable extent than in ordinary times?

A. No; it is generally a little smaller, but not materially so.

Q. If these individual cars and foreign railway fuel cars did not exist, but their place was taken by ordinary B. and O. cars to carry the same tonnage, would there be any difference one way or the other in the number of switching engines or the yard tracks necessary to handle the business?

A. Not at all.

Q. If the tracks were insufficient in the one case they would be insufficient in the other?

A. Yes.

Q. If the engines would be insufficient in the one case they would be insufficient in the other?

A. Yes.

Q. In the movement on the main line, if the load of one of these individual cars or foreign fuel cars were carried in a B. and O. car, would the space occupied, or the power required to perform the service of hauling be any different?

A. No. I think, Mr. Bond, I will have to make a slight correction in that testimony. In the handling of the empty cars there is a slight amount of additional switching, but I do not think that is sufficient to make any difference.

Q. If the existence of the individual car in any way affects the amount of switching, that effect is not obviated by any rule or order that has been made. You understand that you still have to switch out these individual cars?

A. Oh, yes.

Q. And are allowed to deliver them only to the mine?

A. Yes; but you raised the question as to changing from the individual car to the B. and O. car, and that is something on which I suppose all railroad men are on record.

170 Q. Did I understand you, in answer to the question asked by Mr. Walter, to testify that the existence of the private car or the foreign fuel car occasioned delays in the distribution of cars between the mines and the yards?

A. Yes, sir.

Q. It is not altogether clear in my mind what you did testify to. What are the facts?

A. Mr. Walter asked me whether if there was a shortage of motive power, the presence of the individual car would delay other cars, and I testified I thought it might.

He asked whether, if there was any shortage of tracks, the pres-

ence of the individual car would delay other cars, and I meant to testify that it might; but in point of fact there has been no shortage of facilities of that kind on our line for several years, and no shortage of motive power.

Q. Would the effect be any different than that of any other car?

A. Not at all.

Q. If you subtract a certain number of cars when your motive power is short, you will have that much more power per car. Is that what you mean?

A. That is the only thing, and you may handle the other cars quicker. That is all I meant by that. In point of fact, we are equipped for the handling of all the cars that come on the line, and in general, if the railroads were not equipped for handling individual cars, they would be under-equipped, as things stand now.

171 Recross-examination.

By Mr. WALTER:

Q. With reference to the custom of the road in the distribution of cars, do you know to-day what cars are tomorrow to be loaded for the different sections of the country?

A. There is no central office on a large railroad that knows to-day what cars are to be loaded. The information is generally received in the morning of each day what orders have been put in the night before. The car distributor on each division who issues orders for the immediate distribution of the cars received that information generally in the afternoon of each day, for the following day.

Q. If there are 25 cars available for distribution on a certain division, and there are 25 carloads of coal ready to go into those cars, is any attempt made to see that the Southern Railroad's empty cars in that 25 carry coal to a point on the Southern Railway line?

A. Yes, indeed.

Q. If all those 25 cars were Southern Railroad cars, would that make any difference at all in the filling of those 25 orders.

A. That would depend on the circumstances under which those cars were received. If those cars were sent by the Southern Railway on the distinct understanding that they were to be returned loaded to their line, only as many as were ordered by the Southern Railway would be put in. The others would be held over. If the cars had been picked up by the railroad, that is, if they had come loaded from the Southern Railroad, they would probably be diverted. That is the practice.

Q. With how many lines of railroad have you that agreement, that you will return to them and not to other lines cars bearing their number and initials?

172 A. Very few.

Q. Is there any besides the Reading?

A. Of course the foreign fuel arrangements——

Q. I am leaving that aside from the question.

A. We have had arrangements of that kind with a number of other railroads, but the Reading, I think, is the only one that is now

enforced. That is, the Reading is the only railroad that gives us their empties, you understand. Wherever a railroad gives us empties for return loading, there is an arrangement of that kind made.

Q. That is the foreign railway fuel car?

A. Oh, no; for regular loading to their line, in addition to the foreign fuel.

Q. Now, as to the coal loading. Have you any arrangement with any line save the Reading, that their cars will be loaded to them, and to them only?

A. We have had at different times arrangements with a number of such railroads.

Q. But at the present time?

A. I don't think any others are now in effect, except possibly one with the Cincinnati, Hamilton and Dayton. I think not, the reason being that we are unwilling to enter into such arrangements, having enough cars of our own.

Q. It would seem that inasmuch as the other roads keep your cars, you have the same right to use their cars wherever you see fit to send them?

A. Yes; but as long as we are loading our own cars off our line, there is really no object in keeping foreign cars. In fact, we prefer to load back the foreign cars and hold onto our own cars.

Q. But so far as the mine owner is concerned, the available cars for that line may be loaded by him to any destination with a proviso that Reading cars go to points on the Reading road?

A. No; I won't say that. We make an effort to put these
173 foreign cars into mines which can load them in the direction of home.

Q. But if they are there and the mine owner has the coal to load, he can load it?

A. We frequently allow him to divert cars. I ought to say that when that is done it leads to recrimination and retaliation.

Q. You are already a victim of that?

A. We are already a victim of that, but there are some times people who can hurt us more than we can hurt them, and then we are obliged to follow out the rules.

Q. That is true as to the Reading, I take it?

A. The Reading would not give us the cars at all unless we loaded them back.

Q. As to the motive power available for the movement of cars from a distributing yard to the mines, the mine owner who has no private cars, no specially consigned cars, and no railway fuel cars, is to the extent that the motive power is used in moving these excepted classes, deprived of the equal benefit of the motive power in distributing distributable cars. Is not that true?

A. If he needs any more motive power facilities than he receives, I think that would be true; but I feel that that statement in general is only correct in cases where the motive power is deficient.

Q. For example, you have 100 cars that can be moved in to-day to the mines for loading. If 75 of those cars are of the excepted classes, the miners who participate in the 25 have to bear their loss

of motive power and bide their time while these 75 cars are being distributed. Is not that true?

A. That could only happen when the motive power was insufficient, and when these specially assigned cars happened to get ahead of the other kind. If, as is usually the case, there are plenty of engines to move all these cars, those mine owners would be deprived of nothing.

174 Q. In distributing the empty cars, the private cars, the specially consigned foreign cars, and the railway fuel cars are all handled indiscriminately with the empty cars by the engines which take them up to the mines. That is true, is it not?

A. Yes, to the extent that there is no precedent given to movement except sometimes to our own fuel cars.

Q. But if you have one engine to take the fuel cars to the mines, that one engine hauls in the same train all these classes of cars?

A. Yes.

Q. And it drops off as it comes to the mines the cars going to the mine, no matter whether they are private, foreign fuel, company fuel or general distribution cars?

A. Yes; but that would be a pretty long train.

Q. I am using that for the purpose of illustration. They do haul eighty, I guess.

A. Not in this coal train service.

Q. I have seen eighty empty cars in a train, frequently?

A. Yes, in the through service you will, but you will hardly see that in these coal freight trains, because they are generally in mountain divisions.

Q. To the extent that the motive power and the employees of the company are engaged in performing the service of car distribution, the man who gets only company cars which are available for general distribution has to bide his time, while the company motive power and employees are delivering these other cars. Is not that true?

A. It entirely depends on whether he gets his cars first or not. He may get his cars before the other ones.

Q. Well, suppose he does get his cars first. Does he not have to wait while these cars are assembled and handled? In other words, there is no attempt made to first distribute the company cars or to distribute them by themselves?

A. The attempt is made to put cars into the mines before the mines go to work. We have usually from four o'clock in
175 the afternoon until 7 o'clock the next morning to do it, and unless we get the cars in before the mine opens, it does not make the least difference to a man who receives our cars whether the man next to him receives individual cars or our cars.

Q. I am only speaking of course of the time of car shortage and of the time of car movement?

A. Yes; so am I.

Q. When you cannot fill the orders of everybody before the time required for the use of the cars.

A. So am I; but taking the very worst situation, only about one third of the cars can be distributed during the working day, which

is, you see, from about seven to sometime in the afternoon. Sometimes they shut down quite early. Now, the bulk of the cars are distributed when the mine is not working, so much so that the mines will not go to work unless the cars are there. I cannot see that the presence of the individual car hurts the shipper at all. He does not care whether his car is placed at four o'clock in the afternoon or at seven in the morning, as long as it is there when his men go on.

Q. If there is any shortage at all in track facilities or motive power or help, which affects the placing of cars, the man who gets only company distributable cars loses to the extent that that help and motive power is used for the placing of these specially excepted cars. Is not that true? That is the only question I am trying to make, and I have asked it in many different ways?

A. Yes, sir; and I have attempted to answer it only in one way.

Q. Is not that true? Then you can qualify it.

A. Well, put it in this way. If on any division there is more work to do than we have facilities for, it results in delay. Now, everybody participates in that delay, if the reason is that there is too much work assigned to that division for that period. If the reason is there are too many B. and O. cars, the mine owner
176 does not get his share because there are too many B. and O.'s. If there are too many individuals, it is on that account; and it is possible in the rare cases when there is delay on that account that any class of car may cause it.

Q. Let me try one more question. If you have 150 cars to place, and that is 50 cars more than you can place in a given time, and there are three times as many excepted cars as there are distributable cars, the man who participates only in the distributable cars is to that extent burdened with the lack of service, as the service is taken up in placing these excepted cars. Now is not that true?

A. I don't quite understand your use of the word "burdened."

Q. He is deprived of that service that he would be entitled to if you did not have to distribute the cars that are of the excepted classes?

A. I will say the only result of congestion is delay. The only disadvantage anyone gets through congestion is delay. Now, suppose all classes of cars were moved alike. The coal shipper would have his cars delayed in some proportion to the excess of cars which we try to move.

Q. That is all I want to ask. Now, I do not know whether I made it definite or not. Can you testify of your own knowledge that the figures and tables in your deposition are true?

A. I can only testify that they were compiled from the daily reports received at my office.

177 In the Circuit Court of the United States for the District of Maryland.

No. 54, Equity Docket F.

THE BALTIMORE AND OHIO RAILROAD COMPANY
vs.
THE INTERSTATE COMMERCE COMMISSION.

It is hereby stipulated by and between the parties to this cause, through their solicitors, that the deposition of Arthur Hale, to be used in the above entitled cause, may be taken by the Complainant before H. S. Milstead, a Notary Public in and for the City of Washington, District of Columbia, at his office in the Sun Building in the said City, on the 28th day of October, 1908, at 10 o'clock, a. m., or at any other time to which time or times the taking of such deposition may be adjourned, upon oral interrogatories and cross interrogatories propounded by the parties or their solicitors; that the Defendant hereby waives notice of the time and place of the taking of said deposition and any and all objections as to the manner of taking the same or the return thereof, reserving, however, any and all objections to the admissibility or relevancy of such deposition or any part thereof as evidence under the issues in the said cause; that the deposition of said witness may be taken and transcribed by a stenographer selected by the said Commissioner, and that the signing of the deposition be waived; and that the said deposition may be opened at any time before the hearing.

HUGH L. BOND, JR.,
For Complainant.
LUTHER M. WALTER,
For Def't.

178 UNITED STATES OF AMERICA,
District of Columbia, City of Washington, ss:

I, H. S. Milstead, a Notary Public in and for said City and District, do hereby certify that the foregoing witness who testified before me, to wit: Arthur Hale, was by me sworn to testify the truth, the whole truth and nothing but the truth, and that the deposition taken as above set forth was reduced to writing by a stenographer selected by me and was taken at my office in the Sun Building in the City of Washington, District of Columbia, as specified in the annexed stipulation.

Witness my hand and notarial seal, at Washington in said District, this eighth day of December, A. D. 1908.

[NOTARIAL SEAL.] H. S. MILSTEAD,
Notary Public, District of Columbia.

179 *Order of Court Certifying Case for Review to the Supreme Court of the United States.*

Filed December 14th, 1908.

In the Circuit Court of the United States for the District of Maryland.

Equity Docket F, No. 54.

BALTIMORE & OHIO RAILROAD COMPANY
vs.
INTERSTATE COMMERCE COMMISSION.

This cause came on this day to be further heard, and was argued by counsel, and the Court having fully considered the bill, answer, deposition and other papers filed herein, the Judges sitting finding themselves divided in opinion as to the decree that should be entered herein,

It is now ordered, that in accordance with the act of Congress applicable hereto, that this case be certified for review to the Supreme Court of the United States.

Dec. 14, 1908.

NATHAN GOFF,
Senior Circuit Judge, Presiding.

180 *Order to Transmit Record.*

And thereupon, it is ordered by the Court here, that a transcript of the record and proceedings of the cause aforesaid, together with all things thereunto relating, be transmitted to the said Supreme Court of the United States; and the same is transmitted accordingly.

Test:

ARTHUR L. SPAMER, *Clerk.*

181 *Clerk's Certificate.*

THE UNITED STATES OF AMERICA,
District of Maryland, To wit:

I, Arthur L. Spamer, Clerk of the Circuit Court of the United States for the District of Maryland, do certify that the foregoing is a true transcript of the record and proceedings of said Circuit Court, together with all things thereunto relating, in the therein-entitled cause;

And I do further certify that said cause is certified for review to the Supreme Court of the United States pursuant to an order of said Circuit Court entered therein on the fourteenth day of December,

nineteen hundred and eight, by the Honorable Nathan Goff, senior Circuit Judge presiding, which said order is incorporated in said transcript of record.

In testimony whereof, I hereunto set my hand and affix the seal of said Circuit Court, this thirteenth day of January, 1909.

[The Seal of the Circuit Court, Maryland.]

ARTHUR L. SPAMER, *Clerk.*

Endorsed on cover: File No. 21,491. Maryland C. C. U. S. Term No. 695. The Baltimore & Ohio Railroad Company *vs.* The Interstate Commerce Commission. Filed January 25th, 1909. File No. 21,491.

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Supreme Court of the United States,

OCTOBER TERM, 1909.

No. 339.

The Baltimore and Ohio Railroad Company

vs.

The Interstate Commerce Commission

On Certificate from

The Circuit Court of the United States

For the District of Maryland.

BRIEF OF THE BALTIMORE AND OHIO RAILROAD COMPANY.

STATEMENT.

The Baltimore and Ohio Railroad Company, chartered by Act of Maryland and having its principal office in Baltimore City, brought this suit on the equity side of the Circuit Court for the District of Maryland against the Interstate Commerce Commission by filing its bill of complaint, July 20, 1908, and therein praying a preliminary injunction and a final decree

enjoining, annulling, and suspending a certain order of the Commission served June 24, 1908, in a proceeding before the Commission, entitled "Rail and River Coal Company *vs.* The Baltimore and Ohio Railroad Company, No. 1322" (Record, pages 1-10). On July 27, 1908, the Attorney General, in compliance with Section 16 of the Act to Regulate Commerce, as amended by the Act of June 29, 1906, filed in the cause his certificate of general public importance under the Expedition Act of February 11, 1903. (Record, page 24.) In accordance with the provisions of the Act of February 11, 1903, the two circuit judges, by order filed August 26, 1908, designated the Hon. Thomas J. Morris, District Judge for the District of Maryland, to sit with them on the hearing and disposition of the cause. (Record, page 25.)

Complainant's application for a preliminary injunction was set for hearing September 22, 1908. On September 19, 1908, the defendant's answer was filed. (Record, pages 27-43.) By order entered September 23, 1908, the application for a preliminary injunction was denied. (Record, page 55.) Replication was filed October 27, 1908 (Record, page 56), and testimony taken. The issues being questions of law and there being no substantial dispute as to facts, Mr. Arthur Hale, the only witness, who was not only General Superintendent of Transportation of the complainant but also Chairman of the Car Efficiency Committee of the American Railway Association, was able to testify to all matters that counsel deemed necessary to bring to the court's attention.

On December 14, 1908, the cause came on for final hearing and was argued before the two Circuit Judges and the District Judge designated by them. Whereupon the three judges, finding themselves divided in opinion so that no two could agree as to the decree that should be entered, after so stating in open court, passed the order found at page 119 of the Record as follows:

" Baltimore and Ohio Railroad Company
vs.
" Interstate Commerce Commission.

" This cause came on this day to be further heard, and was argued by counsel, and the Court having fully considered the bill, answer, deposition and other papers filed herein, the Judges sitting finding themselves divided in opinion as to the decree that should be entered herein,

" It is now ordered, that in accordance with the act of Congress applicable thereto, that this case be certified for review to the Supreme Court of the United States.

" Dec. 14, 1908.

NATHAN GOFF,
Senior Circuit Judge Presiding."

The order of the Commission brought into question here is as follows (Record, pages 22, 23):

" This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its conclusions thereon:

" It is ordered, That the defendant, The Baltimore and Ohio Railroad Company, be, and it is hereby, notified and required, on or before the 1st day of August, 1908, to cease and desist, and during a period of at least two years thereafter to abstain, from maintaining and enforcing, with respect to interstate shipments of coal, the present practice or regulation of failing or refusing, in times of coal car shortage, to count railway fuel cars and leased or so-called private coal cars against the dis-

tributive shares of available system coal cars which the coal operators, to whom said leased or so-called private coal cars belong or said foreign railway fuel cars are consigned, are entitled to according to the ratings of their respective mines.

"It is further ordered, That said defendant be, and it is hereby, notified and required to establish, on or before said 1st day of August, 1908, and during a period of at least two years thereafter to maintain and enforce, with respect to interstate shipments of coal, a practice or regulation which, in times of coal-car shortage, shall require foreign railway fuel cars and leased or so-called private cars to be counted against the distributive shares of available cars to which the respective operators, to whom the leased or so-called private cars belong or foreign railway fuel cars are consigned, are entitled according to the respective ratings of their mines; and that the said leased or so-called private cars shall always be delivered to the operators owning them and the said foreign railway fuel cars shall always be delivered to the operators to whom they are consigned by said foreign railway; and that in case said leased or so-called private cars or foreign railway fuel cars so delivered to the operator owning them or to whom they have been consigned are not sufficient in number to fill out his distributive share of available system cars, enough system cars are to be added to make up his share according to the rating of his mine as fixed and determined by the system of mine rating on the lines of the defendant."

In order to state the questions of law in the case it is necessary first to state some facts of railroad history and practice and of the circumstances of the traffic as shown in the Record, so that the practical bearing of the Commission's order may appear.

History and Practice.

In Lake Superior and Mississippi R. R. *vs.* U. S., 93 U. S., 442, 446, this Court, speaking through Mr. Justice Bradley, said:

> "It is undoubtedly familiar to most of those whose recollection goes back to that period, that railroads were generally expected to be public highways, on which every man who could procure the proper carriages and apparatus would have the right to travel. This was the understanding in England, where they originated. The Railway Clauses Consolidation Act, passed in 1842 (1845?), provided in detail for the use of railways by all persons who might choose to put carriages thereon, upon payment of the tolls demandable, subject to the provisions of the statute and the regulations of the company . . . Most of the early charters granted in this country were framed upon the same idea."

The Baltimore and Ohio Railroad Company, a Maryland corporation, operates a system of railroads in the States of Pennsylvania, Delaware, Maryland, Virginia, West Virginia, Ohio, Indiana and Illinois. These railroads are all chartered as public highways of the States through which they are maintained. The decisions of the courts in this country and England have held tenaciously to this conception of a railroad as a public highway; and the Act to Regulate Commerce reaffirms the duty of maintaining as public highways all railroads used in interstate commerce, Section 7 of that Act making it unlawful for railroads to prevent the carriage of freights from being continuous "by carriage in different cars, or by other means or devices."

The Railroad Company, in addition to maintaining a public highway, also acts as a common, or, more accurately, a statutory carrier, of goods and passengers, furnishing the cars and

vehicles for the carriage of the same. It provides itself with cars sufficient to handle such freight and passengers, but in the maintenance of the railroad as a public highway is, of course, compelled to receive and haul all freight tendered it, either in its own cars or in those of others. No exception is raised of the sufficiency of its car equipment, and the evidence shows that it is abundant.

The Railroad Company also receives and hauls cars of other railroads, a large part of its business being through freight and passenger traffic and hauling cars other than its own. Its provision of motive power, terminals and track facilities has to be sufficient, therefore, not merely to handle its own cars but all cars coming on the system. The uncontradicted evidence is that its provisions of motive power and track facilities have been based not simply upon the necessity of handling its own cars, but upon the necessity of handling all the traffic that comes on the system, and that they are most ample for the purpose.

A part of the traffic of The Baltimore and Ohio Railroad Company consists of bituminous coal, extensive mining operations being carried on in the States of Maryland, West Virginia, Pennsylvania and Ohio (Record, page 3).

There are eight coal districts along the lines of The Baltimore and Ohio Railroad Company, containing different kinds of coal, and shipping to different markets. The witness Hale (page 58) states this as follows:

> "The coal handled by the Baltimore and Ohio is raised in the Alleghany Mountains and their foothills. Our oldest region is the so-called Cumberland region, which is on our Cumberland Division. We get some coal from this division, and more coal from the Cumberland and Pennsylvania Railroad connection near Cumberland, where the first Baltimore and Ohio coal came from in the beginning. That is the Maryland field. The next field to that is the Meyersdale field on our

Connellsville Division. The Pittsburg field is in the vicinity of Pittsburg. Going west from Cumberland we come into West Virginia, where is our largest field, which we call the Monongah, or the Monongah Division. There is a little coal in the vicinity of Wheeling, and then a great deal of coal in Ohio on our Cleveland and Newark Divisions. In connection with West Virginia there is a little coal on our Ohio River Division. The coal which is raised east of the Alleghanies, on our Cumberland and Connellsville Divisions, goes east, and about sixty per cent of it is dumped into boats at tidewater. The bulk of the coal raised in Ohio goes west, a very large proportion of that being dumped into boats on the Lakes. The coal that is raised in the Pittsburg and Monongah Divisions goes part east and part west, rather more west than east.

"The quality of the coal has a great deal to do with that, people being used to different kinds of coal in different parts of the country; but speaking generally, the coal raised in the Cumberland and Meyersdale regions, is semi-bituminous, that is, it has a small proportion of gas in it. As you go a little further west you have coking coal, a little more gas; further west you have true gas coal, which goes in the Pittsburg and West Virginia regions, and west of that you have a bituminous coal without so much gas in it. The gas coal is the coal that goes both east and west. Most of the semi-bituminous coal goes east, and coal of Ohio west only."

Of course, a large part of this coal is carried for the mine owners, they mining, shipping and selling it. A considerable part, however, as will be shown, is carried for consumers, large users of coal buying their supply f. o. b. at the mines and having it carried to the points of consumption. The Railroad Company, of course, acts extensively as a carrier of coal, supplying its own cars, which in the Record are called "System cars."

Certain large consumers avoid being involved in the competition among dealers in coal by purchasing certain coal at the mines, and having it shipped to their own order in their own cars. The consumers here are shippers. They tender the loaded car to the Railroad at the point of purchase, and the Railroad Company furnishes the motive power. Much of the coal so purchased and shipped by consumers themselves is shipped by other railroad companies who purchase fuel on the line of the Baltimore and Ohio Railroad. It is not, however, confined to these, large factories and other enterprises often finding it wise to buy and ship their own fuel. Statement "K" on page 87 shows the foreign railway fuel cars loaded during the year ending June 30, 1908, and Statement "J" on page 85 shows, as of that date, the cars on the Baltimore and Ohio Railroad belonging to operators and consumers other than the foreign railways.

All railroads are chartered as public highways, maintaining their own track and terminal facilities, and operating their own motive power with the exception of a few which escape the burden of purchasing either cars or motive power—maintain their tracks, etc., and receive the fully equipped trains of other companies. Most railroad companies, however, in addition to maintaining their roads as public highways, find it necessary or profitable to operate also as carriers of freight and passengers, furnishing the cars in which such freight and passengers are carried.

The charters of railroad companies generally require them to receive freight when tendered in private cars, and cars other than their own. Even when they do not in terms so require they accomplish the same purpose by other requirements, it having always been the policy to prevent a railroad company from narrowing the public right to use the highway to the right to ship in the railroad's own cars. The Interstate Commerce Act by its seventh section makes it unlawful for any interstate carrier to prevent the carriage of freights from being continuous "by carriage in different cars, or by other means or devices."

The charter of The Baltimore and Ohio Railroad Company (Acts of Assembly of Maryland of 1826, Chapter 123), by section 18 thereof provides that

> "It shall not be lawful for any other company or any person or persons whatsoever, to travel upon or use any of the roads of said company, or to transport persons, merchandise, produce or property of any description whatsoever along said roads, or any of them, without the license or permission of the President and Directors of said company."

This was evidently meant only to secure to the company the control of its operations and not to suggest how the road should be operated. As the same section provides for the Railroad Company making one charge for tolls and another charge for transportation, it would seem to have been plainly in contemplation that the company should carry the private cars of shippers.

It was clearly contemplated that the Railroad Company should receive and haul the vehicles of shippers and we find that this view has always been taken in its operation.

The Record shows that so early as 1852 the President and Directors of the Baltimore and Ohio Railroad Company accepted a proposition from the Cumberland Coal and Iron Company to equip sufficient coal hoppers to furnish sixty cars per day for its own exclusive use, over and above any apportionment it might be entitled to from the Company's own equipment (Record, page 88):

> RESOLUTION ADOPTED BY THE PRESIDENT AND DIRECTORS OF THE BALTIMORE AND OHIO RAILROAD COMPANY ON SEPTEMBER 25, 1852.
>
> "WHEREAS propositions have been made with The Baltimore and Ohio Railroad Company in reference to an immediate extension of their power applicable to the

transportation of coal from Cumberland to Locust Point, of the greatest interest, not only to the business of the road, but the general trade of the City of Baltimore, in the establishment in connection with other improvements of a line of steam tugs and tow boats to ply regularly between this city and New York; and

"WHEREAS, the Select Committee appointed by the President under the authority of the Board of Trade have under consideration the general subject of the coal trade, and the various applications from coal companies and others referred to them for examination and report;

"*Resolved*, as the sense of this Board, that it is expedient on the completion of the Baltimore and Ohio Railroad to the Ohio River, and the arrangement which the Company will be called upon to make at that point, with the view to the accommodation of the general trade, to give such encouragement to the coal trade, as a distinct and independent business, as may be convenient and practicable to foster the claims of the City of Baltimore as the true point of shipment and distribution, for the products of the mineral region of the State of Maryland.

"*Resolved, that in any future distribution among corporations or persons dealing in coal, to be made, of the power of this Company, all said parties shall be placed upon a footing of equality, upon some fair and equitable basis, to be established by this Company.*

"*Resolved*, that the proposition of the Cumberland Coal and Iron Company to supply the capital for the immediate construction of as many coal hoppers as will give to said Company a regular transit of 60 per day, in addition to their regular apportionment, together with the requisite number of engines to keep said hoppers employed; the same to remain with this Company as a loan for the period of five years, interest to be paid semi-annually at the rate of six per cent. per annum, to the

Cumberland Coal and Iron Company from the period of delivery of said cars and engines; *said power to be appropriated as furnished, to the exclusive use of the said Cumberland Coal and Iron Company during the continuance of the proposed arrangement over and above the apportionment to which they may be justly entitled of the present or any additional power which the Company may hereafter supply from their own means be, and the same is hereby accepted.*"

Through its entire history we find that different firms and companies have, in many of the different coal regions served by the railroad and its connections, purchased private cars and used them in their business, a list of twenty-five coal operators alone between 1857 and 1899 being given on page 89. (Private cars other than coal cars are not given.)

We find in the Record, page 90, 91, et seq., an Act of Assembly of Maryland of 1878, Chapter 155, requiring The Baltimore and Ohio Railroad Company to enter into a contract with the State to receive shipments when offered, either in bulk or in loaded cars.

The charter (April 3, 1837) of the Pittsburgh and Connellsville Railroad Company (the Pittsburgh Branch of the Baltimore and Ohio Railroad System), gives it the right to prescribe the character of the "carriages, wagons and conveyances which shall be used on said railroad," and to charge tolls therefor, and limits the charge it shall make for tolls and freight in its own vehicles to twice what it may charge for tolls alone (Record, page 93):

"Sec. 13. On the completion of said railroad, or any portions thereof not less than ten miles, the same shall be esteemed a public highway, for the convenience of passengers and the transportation of merchandise and commodities under such regulations as shall be prescribed by the directors; and it shall and may be lawful for said company to demand and receive such sum or sums of

money for tolls of persons and property as they shall think from time to time reasonable; *Provided,* the toll on any species of property shall not exceed five cents per ton per mile; nor upon passengers not more than three cents each per mile; and it shall be further lawful for the President and Directors of said Company to prescribe the kind of carriages, wagons and conveyances which shall be used on said railroad for the transportation of persons and commodities and to adopt such regulations as to the transit of wagons and carriages on said road as may seem to them most conducive to the interest of the public and of persons using the same, and the Legislature reserves the right to reduce and regulate the tolls.

"Sec. 14. The President and Directors shall have full power to purchase with the funds of said Company and place on said railroad all machines, vehicles, carriages and teams of any kind whatsoever, which they may deem proper and necessary for the purposes of transportation, and that they may also, to any extent that they may deem advisable, transport all goods, wares, minerals and merchandise, or other articles that may be offered them for transportation, and all passengers wishing to be conveyed on their railroad, and the said President and Directors may charge for toll and freight on all articles or passengers so conveyed by them, their officers and agents, not exceeding twice the rates granted in the preceeding section of this Act for tolls alone;"

The Pennsylvania Act of February 19, 1849 (Record, page 94), entitled, "An Act Regulating Railroad Companies," which to this day is the general law of Pennsylvania, provides:

"Sec. 18. That upon the completion of any railroad authorized as aforesaid, the same shall be esteemed a public highway for the conveyance of passengers and the transportation of freight, subject to such rules and regu-

lations, in relation to the same, as to the size and construction of wheels, cars and carriages, the weight of loads and all other matters and things connected with the use of said railroad, as the President and Directors may prescribe and direct; *Provided,* That the said company shall have the exclusive control of the motive power and may from time to time establish, demand and receive such rates of toll, or other compensation, for the use of such roads and of said motive power, and for the conveyance of passengers, the transportation of merchandise and commodities, and the cars or other vehicles conveying the same, or otherwise passing over or on the said railroad, as to the President and Directors shall seem reasonable;"

The use of steam as the motive power made it necessary to safe and efficient operation that the railroad company have exclusive control of the motive power. Acts were passed in almost every State vesting such exclusive control in the company, but leaving the right in the public generally to furnish and put on cars. By these acts the railroad company, having the exclusive control of the motive power, became the handler for hire of the cars of others, while retaining its right to carry for hire in its own cars. The use of the highway by others than the railroad company became a right to have cars hauled by the railroad company. The rates being charged on the commodities in the cars and not as a mere wheelage the railroad company became a carrier of the commodities in the cars of others.

This carrier service, while concurrent with the carrier service in the railroad company's own cars, was distinct from the latter and was performed either at a lower rate or on terms that gave the owner of the car some compensation for its use.

In England, while the Railway Clauses Consolidation Act of 1845 (8 and 9 Vict., Cap. 20) did not give the railway company exclusive control of the motive power, unless such control be conferred by the company's special act, it did require the rail-

way companies to provide motive power and to handle the cars of any one wishing to use the railway. The companies were authorized and required to do a carrier business in their own cars concurrently with the use by others through the handling of the latter's cars. In section 90 it is stated that one of the purposes of the section is that the company be prevented from using the power to vary tolls " for the purpose of collusively and unfairly creating a monopoly, either in the hands of the company or of particular persons."

The Railway and Canal Traffic Act of 1854 (17 and 18 Vict., Cap. 31), contains in the first section, the following definition of " traffic ":

> " The word traffic shall include not only passengers and their luggage, and goods, animals and other things conveyed by any railway company or canal company, or railway and canal company, but also carriages, wagons, trucks, boats and vehicles of every description adapted for running or passing on the railway or canal of any such company."

Section II then provides:

> " II. Every railway company, canal company and railway and canal company shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats and other vehicles, and no such company shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or

unreasonable prejudice or disadvantage in any respect whatsoever," etc.

In England then, the railways are required to carry in their own cars and are also concurrently required to carry in the cars of others. The special acts of the companies respectively fix one set of rates for the carriage in cars of the company and another set for the carriage in cars of others. Not only are the services distinguished by the rates chargeable, but under the act of 1854, they are distinct "descriptions of traffic."

The right of the shipper to furnish his own motive power, conferred in many of the original charters, has been withdrawn, apparently, because of the confusion and danger attending the exercise of such a right, and not with any purpose to make the public right to use a railroad different in principle from the public right to use a river or highroad. The clear intention was that any shipper should make so much use of the highway as his business required or his capital enabled him to do.

The notion underlying the present claim, that the entire and exclusive right to the use of a public highway for the shipping of a certain commodity (coal) may be the subject of an arrangement or deal between the railroad company and the producing sellers of that commodity throughout a certain territory, would seem to be foreign to the whole policy under which these highways have been built. The contention of The Baltimore and Ohio Railroad Company will be that while the Railroad Company, acting as a carrier, may, so far as it does not interfere with the common right, apportion its cars among its regular customers, it cannot sell to them or divide among them the exclusive right to the use of the highway. That must be free to all—producers, consumers, any one that chooses to ship and conform to the necessary rules.

The provision of the Interstate Commerce Act that we have referred to (Section 7) merely affirmed for interstate commerce the principle that a railroad is an highway—a principle established by the decisions of the courts, and the common view.

The Baltimore and Ohio Railroad Company, in acting as a carrier of coal, has equipped itself with cars sufficient to handle all of the coal offering on its own lines (Record, middle of page 78). Certain large consumers prefer to ship in cars of their own, which are sent to the mines and hauled loaded to the points of consumption. Many of these, though not all, as we have shown, are cars loaded with fuel purchased and shipped by other railroads for their own use. Their main reasons for doing so, and very important to this inquiry, are two:

1. The desire to have temporary storage for their coal—bituminous coal differing from anthracite in that it suffers by exposure and is liable to spontaneous combustion, so that it is impossible to erect large storage places for it except at great expense.

2. The importance of securing regularity in their supply.

The same considerations lead some mine owners, who furnish coal on large time contracts, where facility for storage and regularity of supply are necessary, to equip themselves with a number of private cars for that trade. The witness Hale tells us (page 103) that in the anthracite trade where coal is largely stored, individual cars have not been found necessary. All of these cars, when loaded and tendered to the Railroad Company, are handled by it. The rates charged by the Railroad Company are the same, for the same service, when cars are furnished and when they are not, an allowance of six mills per mile being made for the use of the private car, which Hale tells us is not sufficient to cover interest, repairs and depreciation (page 102).

The use of private cars is, therefore, a more costly method of shipping than in the Company's cars, the owners going to this expense because of the requirements of certain classes of customers. Whether the use of private cars by large consumers is commercially profitable, does not appear. It proba-

bly is more expensive. The more potent reasons for their use are those before given, the regularity of supply and opportunity for temporary storage.

There are, therefore, in use upon the Baltimore and Ohio Railroad several classes of coal cars:

1. The Railroad Company's own coal cars, spoken of as "system cars," used by it as a carrier of coal. The number of them is based upon the estimated needs of the coal trade and they are all furnished to the mine owners and other shippers on the company's line.

2. "Foreign railway fuel cars," being cars owned by other railroads used in carrying their fuel supply. The consumers here are the shippers. These cars are carried by the Baltimore and Ohio Railroad to such points as the owner desires, and the loaded car is tendered to the Baltimore and Ohio to be hauled by it to the point of consumption.

3. "Consumers' cars," being cars owned by certain other large consumers, who are treated in the same manner.

4. "Private cars," being cars owned by certain mining companies, which are treated in the same manner.

The term "individual cars" will be often used herein and in the Record, to denote all cars not belonging to the railroad that carries them.

In the case of both the "foreign railway fuel cars" and the "consumers' cars" the consumer himself is the shipper, purchasing coal f. o. b. at the mines, and tendering his own loaded cars for carriage (Hale, page 95). In the case of the "private cars" the mine owner is the actual shipper, but, as will be explained, the reason for owning these private cars also grows out of the necessities of certain consumers in whose business a steady supply of coal is necessary.

"Percentage Periods," their Nature and Cause.

Percentage periods are times when the demand for cars is such that the railroad is unable to fill all demands and has to apportion its cars. The impossibility of the railroad controlling the situation arises, in the main, from two causes which will be discussed under their respective heads:

(*a*) Detention of cars on foreign roads.
(*b*) Fluctuation in the amount of coal tendered.

The sufficiency of the Railroad Company's car equipment for the performance of its duty as a carrier in respect to the receipt and transportation of coal from all the mines is formally alleged. (Record, page 3). The answer distinctly refrains from any denial (Answer, paragraph VIII, pages 31-32). The witness Hale testifies that it is "entirely sufficient" (page 78) and there is nothing to suggest the contrary. The circumstances which, according to the Bill, at times, and especially in the winter months, prevent the railroad from filling all orders for cars are two, "detention on foreign railroads of cars of your orator which have been consigned to points on such foreign railroads, and the very great fluctuation in the amount of coal tendered to your orator for carriage by the mines aforesaid." Let us consider these separately.

(*a*) *Detention of cars on foreign railroads.*

As will be shown hereafter, bituminous coal, differing from anthracite, cannot be stored, it suffering by exposure and being liable to spontaneous combustion. The cars are therefore largely used for temporary storage. On June 30, 1908, the Baltimore and Ohio Railroad owned 44,808 coal cars (page 66). Between November, 1905, and May, 1906, it had purchased 10,000 new cars of which 7,500 were applicable to the coal

trade (page 66). In spite of this large purchase, the number of cars available was no greater, the excess being "swallowed up by the other railroads" (page 69). Statement "H" filed by Hale (page 74) and explained by him at the bottom of page 72, is a Report of the American Railway Association, showing the "car balances" of the different bituminous railroads, that is, the number of their own cars off their lines and the number of foreign cars on them. It shows the Baltimore and Ohio as being short during shortage times of more of the cars owned by it than any other road (bottom of page 72), it being short over 12,000 of the number owned, and having on its line only 85 per cent. as many cars as it owned.

On pages 104-105, it is shown that roads differ in this matter, some roads owning largely and others borrowing, and the witness Hale tells us (top of page 105) that if the Baltimore and Ohio Railroad were to purchase as many more cars, or any number, it would have no assurance that the cars would be available for shipments made on its line. The Court will see that it is impossible for the railroad to control this situation, it being an originating road. The impossibilty of so doing is explained on pages 103-104.

(*b*) *Fluctuations in amount of coal tendered.*

The testimony of Arthur Hale, on pages 76, 77, and 78, gives a clear explanation of this situation:

> "A. We handle almost as much coal in the winter as in summer. On very cold days and on snowy days, of course, we do not handle near as much, but, as a rule, we average very well during the winter months. But the coal is not consumed equally all throughout the year. More coal is burned in winter than in summer, and when there is an increase in the demand for coal, for any cause, the price rises rapidly. The reason that the price of coal rises so rapidly is that a large

proportion of the coal burned is supplied on yearly contracts, which are made at a comparatively low price, with a small margin of profit, and those contracts are not exactly lived up to.

"Let me say again, these contracts are generally made for the maximum consumption of the purchaser, and during the summer the purchaser very seldom is willing to take the total amount of his contract. When the winter comes, it is quite usual for the purchaser to demand the full amount of his contract, and the increased demands from contract purchasers alone are frequently so great that the parties who have made the contracts cannot get enough cars to fill the contracts. It is the same contract as it was in the summer. The shipper has practically the same cars he had in the summer months. The purchaser is demanding the full amount of his contract instead of a portion of the contract.

"The thing that follows is that *the contractor looks around and tries to buy coal of somebody else*, and the price of spot coal, as it is called, rises very rapidly, there being a very small amount of spot coal on the market.

"The minute the price rises the coal operators who have shut down in summer because they have not contracts, open up again and demand their share of cars. They enter into correspondence with all consumers they know, and try to get direct orders, *and they also attempt to sell their coal to the people who have contracts. It is by no means unusual, during times of car scarcity, to have mines open up and load cars without having any idea where the coal is going, and then enter into correspondence by letter, by wire, or by 'phone, with parties who they know have contracts, with the idea of selling them this coal at an advanced price.*

"That process, you can see, during continued cold weather, is something that grows like a snowball, and

the price of coal sometimes goes very high. *That, of course, makes the loss to the parties who have contracts very considerable, because they are obliged to buy their coal at high rates, in order to fill their contracts, and it also make it profitable to work mines which cannot live with the average price coal.*

"Just as soon as the price gets above a certain amount, these mines, which for one reason and another, produce expensive coal, open up. Their orders come in and increase the demand for cars.

"That is why I say the price is the leading factor, because, if the price does not go up, these mines which are costly to work do not open up at all, and there is not the demand, and therefore not the apparent shortage.

"From some points of view these shortages are not really shortages at all. There was a genuine coal shortage in the year following the anthracite strike and the price of coal went up very high. I know it to have been up to $15. and $20. a ton during that period. None of that happened in 1906 or 1907, *so that the shortage was really more a fencing around between coal operators, than a real shortage to the consumer.*"

Again, on page 77 (at the bottom) he says:

"A. I have some figures here. I find that in the summer of 1906 the orders ran about 80,000 cars a month on our line. That increased until in October, 1906, there were orders placed for 100,000 cars, and in November and December, the orders ran 100,000 and 96,000. In January, 1907, the orders ran to 97,000. There are about 20,000 more cars a month ordered in winter than in summer.

"Q. About 25% increase?

"A. About 25% increase, yes, sir. The orders would be very, very much greater if it were not that

under our system of car distribution, *if a man orders more cars than he needs and we place them and he does not load them,* we charge the cars left over against him the next day. That has brought the orders down. In previous years the orders used to be a great deal more, proportionately."

And on page 78, line 3, he states:

"Q. As a matter of business experience and fact, it would not require any such number of cars, however, to satisfy the demands represented by those orders—are not the orders duplicates of the same business contracts?

"A. Very frequently. *In all these cases where cars are ordered from us and loaded up by a shipper without knowing where they are going, it is a duplicate and sometimes a triplicate of the same order.* Whenever a shipper who has a contract, cannot fill that contract and attempts to buy coal from others, his order for cars is duplicated or triplicated, according as he places that order with one of two other persons. He will order the cars he wants from us, and he will place that order with the other men, and each of them will order the cars that they want. That duplication of orders shows up especially at any point where shippers on sidings order cars from various railroads.

"Here is an example, not in the coal trade, but it is at a place where you can appreciate it more thoroughly. The man in Chicago, when he wants to ship grain east during a car shortage, will order his cars from six or eight eastern roads, and that will show up as a shortage on every one of those roads, when really it is only a single shortage. The same thing occurs in the coal trade whenever cars get scarce. The orders are duplicated, if you look at it from the point of view of the consumer. The man who really wants a car of coal in

a hurry will have his orders so placed that it may appear to the railroad as if there were three or four cars wanted.

"Q. Can you state whether, in your judgment, the car equipment taken with the locomotives and other equipment of the Baltimore and Ohio Railroad, is sufficient to move the coal offering on its lines?

"A. *It is entirely sufficient.*"

A chance has come for the speculative operator to squeeze the operator who has time contracts. The operator with time contracts, afraid of defaulting, is ordering spot coal at fancy prices, and beyond his actual sales. The speculative operator is interested both in getting cars for the special market *and in adding to the trouble of the operator with time contracts who creates the special market.* Operators order cars without regard to their ability to fill them. The railroad has orders for cars beyond the capacity of the region for which its car supply has been purchased.

During ordinary times, when the cars of the railroad are sufficient for all demands, there exists what is called a period of free car distribution, and the railroad company furnishes to each mine all that it calls for (Hale, page 79 at the top).

Where the situation arises that we have described above, there comes what is called a "percentage period," when the Railroad Company, though equipped with cars to convey all the coal that will be actually offered, cannot supply all the cars called for—the duplicate and triplicate calls—and has to apportion the cars it has among the different mines. Different railroad companies use different methods in endeavoring to make a fair apportionment during percentage periods. The method adopted by The Baltimore and Ohio Railroad Company, is stated by the witness Hale (page 79, lines 1-12) as follows:

"A. When there are plenty of cars we fill all orders. Whenever in any period the cars are not sufficient to fill orders we distribute the available cars on a percentage basis.

"Q. What is the percentage basis?

"A. Each mine given a percentage of the total distribution in a region, and that percentage is based on two factors; the first factor is the physical capacity of the mine, as ascertained by our Mine Inspectors, and checked up by the mine owner. The second factor is the commercial capacity of the mine as indicated by its past shipments in two periods when the car supply was free.

"Q. Periods in successive years?

"A. Two periods in successive years, when the car supply was free."

It is also set forth correctly and in a little fuller detail by Commissioner Harlan in the Report of the Commission, on pages 18-19, as follows:

"In 1902 the defendant established a percentage basis consisting of two principal factors, (*a*) the physical capacity of the mine, and (*b*) the commercial capacity. The physical capacity is determined by the thickness of the coal seam, the number of rooms or working places, the capacity of the underground tram tracks, and the facilities for getting the coal out of the mine into the tipple, and from the tipple into the cars. A fixed per diem value is assigned to a man's labor, taking into consideration the character of the seam upon which the work is to be done; and the number of places in which a man can work is taken into account regardless of the number of men actually employed. This in substance is the method generally adopted in arriving at the physical capacity of mines. But the defendant takes into consideration also what is referred to in the record as the commercial capacity of the mine, that is to say, the actual requirements of a mine for cars as tested by actual shipments made by the mine. This factor is arrived at by taking the volume of shipments

made by the mine during a period of free car supply, usually of four months and generally from April 1 to August 1, in each of the two preceding years. In figuring the actual shipments made by a mine during these two free car periods, all its shipments are included except the shipments of fuel coal to the defendant company. These three factors, namely, the physical capacity, the commercial capacity for the first year, and the commercial capacity for the second year, are added together and divided by three. The result is the capacity basis for determining the percentage of available cars that a particular mine is entitled to receive during percentage periods.

"This method of rating mines was adopted by the defendant in 1902, after a careful examination of the various systems in force on other lines. It was intended as a compromise between ratings based on physical capacity only and ratings based on commercial capacity only."

It is important to note that the commercial capacity for the two years is taken during periods of free car supply when each mine is getting all the cars it can use. All the coal shipped by each mine in any manner is counted except that sold to the railroad itself, it not being considered that purchases by the railroad should affect the distribution of its cars.

Witness Hale tells us (page 81, near the bottom), that during the first car that this system was in effect he took, to indicate the commercial capacity of the mine, the entire shipments for two full previous years; that shippers raised the point that it was unfair to base a percentage for one year even in part on the cars distributed on a percentage basis the previous year. The Railroad Company recognized the soundness of this criticism and based the commercial capacity only on shipments made in time of free car supply.

The claim was made before the Commission in this case that

in rating mines for car supply the physical capacity only of the mine should be considered, and not the commercial capacity. This claim was not sustained by the Commission. While it is not the subject of appeal, it is well to look at the facts which have led the Railroad Company to consider the commercial capacity as well. The matter is well explained in the testimony of Hale (page 79) and the table filed by him (page 80). We there find that if the physical capacity measured the shipments of the railroad, then shipments would amount to 73,000,000 tons of coal (pages 79-80) as compared with 18 to 22 millions, the actual shipments (page 60); in other words, the physical capacity amounts to nearly four times the actual shipments. He explains on page 81 that there are not miners in the United States to work these mines to their physical capacity, and the outputs if they were so worked could not be marketed.

The claim made by the Rail and River Coal Company, while not the subject of appeal here, is instructive, for it carried further the fallacious doctrine on which the Commission's Order is based. The order of the Interstate Commerce Commission holds that the Railroad Company must exclude the consumer from all right to ship, and divide the exclusive right to use the railroad among the producers of coal along its lines *in proportion to the extent of their business operations.* The claim of the Rail and River Coal Company was that the Railroad Company must not only exclude the consumer from all right to ship, but must divide the exclusive right to use the railroad among the owners of coal producing land along its line, *in proportion to the extent of their properties.*

It is to be noted that the shortage of cars does not arise from a failure of the Railroad Company to provide sufficient cars to handle the traffic originating on its line. Its supply of cars is based upon this, and the testimony is clear to the effect that the equipment is sufficient for the carriage of the actual coal offering at that time, as well as for the coal offering in a time of free car supply. The difference is not so much in the actual amount of coal to be carried, as in what might be called the

unreliability of the call for cars. Many of the orders are duplicates and several cars will often be asked for the same load of coal. Hale tells us (page 113) that the number of cars handled in percentage times is about the same, even a little smaller, than in times of free supply. It would be impossible for the Railroad Company to provide cars for shipments uncertain in amount and in part likely to be imaginary in character. There are no figures on which to base an estimate of this character. The operator dealing in "high-priced" coal, in other words speculative coal, has nothing to limit him in his demands. He is irresponsible so far as the railroad is concerned. The witness Hale tells us (page 78) that the man who wants a car will so place his order that it will look as if there were three or four cars wanted. He will call for cars up to the limit of his physical capacity and perhaps beyond it. If he calls for cars merely up to the physical capacity of his mines the railroad would have to furnish cars up to that physical capacity, and this, as we find from Statement I (page 80) would mean that the railroad would have to furnish cars to nearly four times the number actually needed. The same witness tells us, at the bottom of page 76, that it is common in times of car scarcity to open a mine, get cars and load them up and then begin to negotiate for the sale of the coal, and (at the bottom of page 77) he tells us that the orders have been somewhat brought down by charging a man for cars that he orders and does not load. These features will explain his statement elsewhere that the number of cars distributed in a percentage time is generally a little smaller than at ordinary times (top of page 113).

The Baltimore and Ohio Railroad Company, in dealing with the furnishing of equipment during times of car shortage, acts upon simple elementary principles, recognizing not only that it is a common (statutory) carrier, but also that its road is a public highway, the public use of which it has no right to limit in the interest of its carrier business even if it desired to do so. *First*, it recognizes that any one has the right, so long as he does not interfere with

others, to load freight in his own cars and tender them for carriage to the railroad; that it is the duty of the railroad to haul such cars freely and impartially; that it has no right to limit or restrict persons so shipping either in the interest of its own business as a carrier or because of the competitive relations with others who ship only in the railroad's own cars. It therefore hauls the loaded private cars so tendered and returns the empties, without regard to the number of its own cars which their owner may be entitled to. *Second*, while believing it proper to apportion its own car supply among the regular producers of coal along its own line, it considers such action permissive and provisional, simply and solely a means of making a fair distribution of its own car supply: not for one moment an assertion of the right to forbid a consumer to ship coal or to oust the public right to use the railroad as an highway; it does not apportion among those mine owners the exclusive right to use the railroad for shipping coal. Accordingly, it recognizes that the consumer, whether railroad or manufacturer, has also the right to ship for his own consumption and in his own cars any amount of coal he may purchase independent of the apportionment of the railroad's cars among the operators. It therefore hauls the "foreign railway fuel cars" and "consumers' cars" of other consumers when loaded and tendered to it, to their destination, and carries the empties back to the mines, without reference to the number of its own cars to which the owners of those mines may be entitled. *Third*, while recognizing the duty, both at common law and under the provisions of the Act to Regulate Commerce, to carry for all shippers at the same rate, under the same circumstances, and to furnish facilities for all alike, *it does not consider that it has either the duty or the right to enter into the outside business conditions of its customers so as to equalize them in their competitive dealings.* It considers that it is its duty to hold out to all the public the same opportunity to use the railroad. It does not consider it its duty to see to it that all are in the same situation to embrace that opportunity. Acting upon these

principles, it has, in dealing with its own cars during times of free car supply, furnished to coal operators on its lines all the cars they asked for; during times of car shortage, or "percentage periods," it has apportioned its cars among these operators according to the ratings of their several mines upon a principle which the Interstate Commerce Commission has approved. Private cars, whether consumers' cars, belonging to other railroads, factories, etc., or belonging to miners of coal, it has treated as the property of their owners, treating all such owners alike and affording equal opportunity to all to become such owners; when loaded and tendered for shipment it has hauled such cars to destination, charging the same rates as on coal carried in its own cars, allowing six mills per mile allowance for the use of the car. It has received such loaded cars, and as many of them as were offered, without any reference to what cars it itself could or could not furnish to its regular customers.

The claim is made by the Interstate Commerce Commission that the railroad shall not allow a consumer, as such, to ship, but shall charge his cars against the seller from whom he buys his coal, and shall refuse the use of its road as an highway to operators who have purchased private cars, because this gives them an advantage in business over those who ship entirely in the cars of the railroad. This the railroad has treated as not in its power. So long as it, as a carrier, fairly apportioned the use of its own cars among those who asked for them, and allowed the free, equal use of its railroad as an highway to all who chose so to use it, it has disclaimed any duty to effect an equality of result among competing merchants. It has considered that it had no right to handicap one in the interest of another. It must afford equal opportunity to shippers to use such of its facilities as they may desire. It must not interfere between shippers differently equipped in order to secure equality in their commercial results. It has also held that it can not recognize the right of competing sellers to forbid the use of a railroad to a consumer as such.

ISSUES OF LAW.

The bill of complaint, Section X, found at pages 8 and 9 of the Record, states the grounds for holding invalid the order of the Commission, as follows:

> "X. Your orator is advised, and so states, that the said order of the Interstate Commerce Commission is unlawful, null and void for the following and among other reasons, and in the following and among other particulars, to wit:
>
> "*First.* In that said Commission has assumed and does assume to make and enforce said order on authority of Section 15 of the Act to Regulate Commerce as amended by the Act passed June 29th, 1906, commonly known as the Hepburn Act, as one contemplated and authorized by said Section 15, and assumes and seeks to subject your orator to the penalties provided by Section 16 of said Act as so amended for failure to obey an order lawfully made under said Section 15, whereas in fact and in law said order of the Commission is not an order contemplated or authorized by said Section 15 or lawfully issuable thereunder by the said Commission."
>
> * * * * * * * * * * * *
>
> "*Fourth.* In that the said Commission erred in holding or deciding that your orator was or is in and by its present regulations or practices mentioned in said order doing anything unlawful, and in ordering and requiring your orator to abstain from maintaining and enforcing with respect to interstate shipments of coal its present practice or regulation referred to in said order.
>
> "*Fifth.* In that the said Commission erred in requiring in and by the said order that your orator established with respect to interstate shipments of coal a

practice or regulation specified in said order. By establishing, maintaining and enforcing such a practice or regulation as that so specified your orator would in fact violate the provisions of the third section of the Act to Regulate Commerce by making, creating and giving undue and unreasonable preference and advantages, and undue and unreasonable prejudices and disadvantages as between shippers of coal in interstate commerce over its lines of railroad contrary to the provisions of such section."

The ground first stated raises the question of the definition and scope of the powers conferred on the Commission by Section 15 of the Interstate Commerce Act as amended by the Act of June 29, 1906. The other grounds question the validity of the Commission's order on its merits, so to speak. We shall argue the first ground separately, and the two others together.

ARGUMENT.

A. Scope of the Commission's Powers under Section 15.

The Interstate Commerce Act as amended leaves in the Commission the same broad powers under Sections 13 and 14 to investigate, hear complaints about and to stop all violations of the Act that the Commission possessed prior to the amendment of 1906. In addition to these powers, it conferred by Section 15 the power, in certain cases, upon complaint and hearing and after finding a violation of the act, to prescribe rates and regulations for a period in the future not exceeding two years. This new power conferred by Section 15 is, by the terms of the Section, confined to rates and to regulations or practices affecting rates.

Section 6 of the Act as amended, provides

"That every common carrier subject to the provisions

of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. . . . The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. . . .

"No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs;"

We submit that the words "any regulations or practices whatsoever of such carrier or carriers affecting such rates," found in the 15th Section refer for their definition to the 6th Section, and include all regulations and practices under which privileges or facilities are granted and allowed which in any wise change, affect or determine any part or the aggregate of the rates, fares, or charges, or value of the service rendered. To give the language of the 15th Section the construction given by the Commission in the Order in question here, not only does violence to the language of the 15th Section but neglects to draw the distinction which Congress clearly intended to draw between the powers of the Commission under the 15th Section and its power under the 13th and 14th Sections.

B. The Merits of the Commission's Order.

To discuss the order of the Commission, let us state carefully what its effects are. It orders,

1, that the private cars (including the consumers' cars) shall be handled by the Railroad Company only as private cars, and hauled for their owners alone.

2, that in times of car shortage an operator who takes his proper share of the Company's cars shall not be allowed to use his private cars. (He may purchase the right to use them by surrendering an equal number of the system cars to which he is entitled.)

3, that in times of car shortage a foreign railway or other consumer shall not be allowed to become a shipper at all, but the cars it uses shall be charged against the coal operator from whom such consumer has bought his coal.

The duty of the railroad to receive private cars and haul them as private cars is made a distinct railroad service, as it always has been, in the coal traffic and all other forms of traffic. The company may maintain an highway, and haul the cars of those who equip themselves and demand that form of

service. Service in the Company's own cars is also open to all traffic demanding that form of service. Should the company, however, at any time be unable to fill all orders for this latter form of service, it shall divide it equitably among those desiring to use it, but in order to enable those who have only equipped themselves to ship in this manner to better compete commercially with those who also use the railroad as an highway, it shall, at such time, withdraw the use of its motive power, etc., from those who have equipped themselves to ship in their own cars. It shall also, at such time, refuse to allow the consumer to ship at all, but compel him to purchase any right to use the railroad from some producer of coal.

The Commission has eliminated from consideration the fairness of the mode of rating the mines. The sole complaint, then, is that the railroad in distributing its own cars to the several mines does not count against the allotment to certain mines the " individual cars " loaded and shipped from those mines. There is no complaint that the railroad's own cars are not fairly distributed. The cars allotted are promptly sent and promptly hauled, there being no dispute on this point. It is admitted under the Commission's ruling that the number of the railroad's own cars distributed to each mine would be fair if there were no " individual cars." The complaint, therefore, is that the Railroad Company, after distributing its own cars fairly among its shippers, allows to certain operators the use of their own private cars in addition—in other words, receives and hauls their loaded cars when tendered, and returns them empty. This is the act complained of—the allowing the owner of private cars to load and tender them in addition to the system cars that he has received.

Considerable confusion has been injected into the argument by treating the question as if it involved some unfairness in the mode of distributing the cars. There is no complaint as to the fairness with which the cars are distributed, or the promptness with which they are delivered and hauled. The complaint is that the owner of private cars gets the use of

them as an additional number of vehicles. The Railroad Company while receiving and hauling for him, as loaded cars, the system cars which it has furnished him, receives and hauls for him as a separate service, his loaded private cars.

An earnest effort was made by counsel for the Interstate Commerce Commission in the examination of Mr. Hale, to show that the handling of the individual or private car involves an obstruction of the service rendered by the Company in its own, or system, cars. The examination only made more and more clear the fact that it did not involve any such obstruction. Counsel for the Commission, therefore, was forced to content himself with an effort to prove that in the distribution yards cars could be put in trains and taken out of trains with greater dispatch if there were no private cars *to the extent that the private cars make up the total.* As this only involves the statement that few cars can be handled quicker than many cars, Mr. Hale replied that that would be so not only in the yard, but on the road. The testimony on page 109 is as follows:

> "Q. In distribution yards where the track space is limited, cars could be put in trains and taken out of trains with greater dispatch if there were no private cars, *to the extent that the private cars, make up the total,* is not that true?
>
> "A. I will answer that yes, but I would like to explain that when I answer yes, I answer to cover the dispatch not only in that yard, but on the road," etc.

There being no controversy as to the dispatch—the promptness with which the cars are handled—but only as to the legality of allowing the owners to have them at all, the comparative time occupied in switching them in and out of trains in the distribution yards would seem to the last degree irrelevant.

One kind of service does not obstruct another, but only requires the railroad to attend to both.

It is important to notice, however, that if there be any obstruction of service by the switching of the private cars in the distribution yards, the Commission by their order have carefully provided for the continuance of that obstruction, the Order (page 22) stating that the private cars and foreign railway fuel cars are always to be delivered, respectively, to the operators owning them and to the operators to whom they are consigned:

> "and that the said leased or so-called private cars shall always be delivered to the operators owning them and the said foreign railway fuel cars shall always be delivered to the operators to whom they are consigned by said foreign railway;"

In destroying the usefulness of the private car, do not the Commission seem to have tried to preserve a supposed bad feature of it? Even that bad feature is imaginary, which illustrates how far the Commission was astray on this whole matter.

Of course, what the Commission was trying to do was to lessen as far as possible the element of confiscation involved in their Order, but after wandering from all elementary principles in the essential part of their action and confiscating immense quantities of property without the quiver of an eyelash, the conservative spirit of the Commission would seem to have been somewhat belated in this treatment of a small detail. The Order of the Commission directs that the owners of property shall be allowed the apparent ownership thereof only on the forfeiture of other property rights, but that this apparent ownership must be carefully preserved for them.

I.

The allowing the owner of private cars to use them as private cars does not interfere with or diminish in any degree the service rendered by the Railroad Company to the complaining Coal Company, but the grievance consists wholly in the advantage which the owner of private cars gets by having them.

In other words, the complaining coal operator, who does not own private cars, gets precisely the same number of system cars, and receives the same use of them that he would get if there were no private cars. What he complains of is that the purchaser of private cars by equipping himself to use this separate railroad service has put himself in a position to do a larger and a steadier business than if he had to rely on system cars alone. There is no complaint that the railroad discriminates against him in the distribution of its own cars, or that the use of the private cars interferes with his getting his fair proportion of these. If we examine paragraph VI of the Petition of the Rail and River Coal Company (page 42) we find that the sole complaint is that the Railroad

> "arbitrarily furnishes said cars and hauls the same for and on behalf of the parties owning or claiming to own such cars or on behalf of the owners or operators of coal mines on the lines of defendant's railway *in addition to the cars to which such owners or operators of coal mines are properly entitled in the general distribution of cars by defendant.*"

In Paragraph V, which deals with the foreign railway fuel cars the complaint is that they are delivered to the mines

> "Without charging the same against *the percentages or distributive shares of cars to which such mines might be entitled* under the aforesaid distribution."

The alleged discrimination against the complaining Coal Company, therefore, consists not in depriving it of anything that the railroad could give it, but in leaving open another and entirely separate form of service.

The right of a shipper to use private cars, and the duty of a railroad to receive and haul them, have never been disputed, and are not disputed here, but recognized by the Commission's order. The receiving and hauling them is a separate railroad service, well recognized. The Baltimore and Ohio Railroad Company allows all shippers who chose to purchase private cars to use them upon its railroad without discrimination. The alleged advantages obtained by their use seem, therefore, to be commercial advantages which their owners obtain by a larger outlay and a more complete equipment. They do not, in principle, differ at all from the advantage which one dealer gets by shipping and paying for two cars over another who can only ship and pay for one car. The demand, therefore, by one shipper who does not wish to go to this expense that the Railroad Company should prevent another from doing so, seems to us to be a demand that the railroad should discriminate in his favor. This we treat under the next heading. All we wish to emphasize here is the fact that the complaining Coal Company is not, by the use of the private cars, deprived of any service in kind or degree that the railroad could or would otherwise furnish to it. This fact, which, under the circumstances, the Railroad Company considers destructive of the whole charge of discrimination, has been met in a strange way by the Interstate Commerce Commission. The Commission, in effect, make the ruling that even though there has been no claim that the service rendered by the railroad to the complaining Coal Company has been lessened by the hauling of the private cars, and no evidence of such fact offered, they may still find such fact and base their decision upon it. They would base such finding upon what they call (page 17) "the very obvious relation" between a shortage in cars and an insufficiency in motive power, sidings, tracks, etc.

In paragraph marked (*h*) of the answer on page 31 the Commission after dealing with the other alleged features of discrimination which do not involve any lessening of railroad service to the complaining Coal Company, and are treated hereinafter, make this statement:

> "(*h*) That said 'foreign railway fuel' cars and 'private' cars occupy the tracks and sideways of the complainant, are drawn by its locomotives, operated by its employees, and must lessen the facilities in those respects of mine operators to whom they are not assigned, and should, therefore, be counted or taken into account in determining the pro rata share in the general coal car distribution of the operators to whom they are assigned."

Not only was the complaining shipper in the present case oblivious of this injury, but the Commission in their report, on page 17, go somewhat out of their way to notify parties making complaint *that they ought to be more conscious of this injury.* They say:

> "It may be well, however, at this time to say for the general information of those interested in such matters that *in this proceeding, as well as in other proceedings that have come before the Commission, too little stress has been laid upon the very obvious relation between a shortage in cars and an insufficiency in motive power, in sidings, in tracks, in train crews, and other facilities necesary to the movement of traffic.*"

The "too little stress" had been none at all. Shippers in this and in other cases have not complained of this injury, because they have not been injured by it. Those who have brought these complaints have been people as familiar with the nature of the Railroad's transportation agencies as the Railroad people themselves, and therefore well aware that there

was no such relation. This is the reason that they have never made it a ground of complaint. The "very obvious relation between a shortage in cars and an insufficiency in motive power, sidings, etc.," is purely imaginary. *There is no proportion or relation between a shortage in car supply and a shortage in motive power and track equipment.* The Commission simply conjured up a relation of which there was no evidence and which in fact does not exist. The witness Hale testifies, on page 98, that it is not a fact that the handling of foreign fuel and private cars *must lessen* the facilities in those respects of the operators to whom they are not assigned. On page 114 he testifies that there has been no shortage of facilities of this kind on the Baltimore and Ohio's line for several years, and no shortage of motive power. On the same page he testifies that the said railroad is "*equipped for the handling of all the cars that come on the line.*"

A moment's reflection on the nature of a railroad will show to the Court that a railroad, conducting a public highway, required to receive and haul cars of other roads when delivered to it, either for points on its own line or beyond, receiving on its own line not only its own cars but the private cars for grain, coal, fruit, vegetable, and agricultural traffic, as well as passenger cars, leaving out the specially constructed cars such as those of circuses, theatrical troupes, etc., requires an equipment in motive power, sidings, etc., *out of all proportion to the cars provided by it as a carrier of one special commodity originating on its own line.* To say that a railroad's motive power and track equipment bear a fixed relation to the total of its own cars would be a mistake. To say that it bore a fixed relation to its *coal cars,* or its *grain cars,* would be absurd. Some well equipped railroads have little use for cars of their own, some require a great many, and some active, useful and profitable railroads own none at all, but haul the fully equipped trains of other roads. There is in this case no complaint of any lack of promptness in the delivery or hauling of the railroad's own cars, either from the presence of the private cars or for any other reason, and no evidence thereof.

We find (at the bottom of page 62) that the Baltimore and Ohio Railroad Company owns about 87,000 freight cars (passenger cars not given). Near the bottom of page 66, we find that its coal cars on June 30, 1908, amounted to 44,808. If there is any fixed ratio of the Company's motive power, track equipment, etc., to its cars, it would seem to be to the whole 87,000 cars rather than to the 44,808 coal cars, for the same engine hauls coal and grain and lumber and often times passengers. The same tracks and sidings, too, are used by both. In fact, however, there is no such relation, and the measuring cars by their relation to power and track equipment, or vice versa, would be little less astray than attempting to measure distance in ounces or pints.

Of course, there *could be* a car shortage caused by insufficient motive power and track equipment. Any number of cars in one place would leave a shortage elsewhere if there were no engines. So, too, if there were no tracks, the cars could not go where they could count. But a car shortage may come from not having cars. It generally does. There may be a car shortage caused by lack of motive power, etc.; there may be one where the motive power, etc., are superabundant; there may be one where motive power is deficient and yet not caused by it in the least. The Commission tells us (page 17) that in one case which came before it a railroad had not enough cars and not enough locomotives, etc., at the same time. That might well be. A lack of funds may hamper a railroad in the equipping itself at all; but in the case of a railroad admittedly heavily equipped and not lacking funds for any necessary demands, such a fact has no bearing.

It is shown by overwhelming evidence that The Baltimore and Ohio Railroad Company, so far from having any deficiency in motive power, etc., is most heavily equipped in that regard. Statement " H " on pages 74-75 is taken from the Report of the Car Efficiency Committee of the American Railway Association, of which the witness Hale at that time was Chairman(page 72). That statement as explained by Hale (pages 72-73) shows the

Baltimore and Ohio as having in 1907 more of its own cars on other lines than any other of the bituminous coal roads, *a larger number of engines per car* (1 to 57) *than any except the Norfolk and Western, and a greater car mileage per day than any except the Norfolk and Western.* On page 94, Hale testifies that the power and track facilities have been provided to take care of the whole business, *and that the handling of the individual and foreign fuel cars does not affect the handling or movement of the bituminous coal in cars owned by the Company.* On page 114 he tells us

> "In point of fact we are equipped for the handling of all the cars that come on the line, and in general if the railroads were not equipped for handling individual cars, they would be under-equipped as things stand now."

It is to be remembered that while practical necessity and the Interstate Commerce law both require the sending of a railroad's cars upon other roads, its motive power and track equipment remain within its own control.

As against all this, we have no evidence or claim of any lack of equipment, no evidence or claim of any imperfection of service. Still less have we any suggestion of a deficiency of service caused by a lack of equipment. We have nothing but a violent and (we say it with the greatest deference to the Commission) an entirely baseless suggestion.

We therefore feel that this whole suggestion that the use of the private cars lessens or impairs the service that complaining Coal Company would have otherwise received goes out of the case and the charge of discrimination must stand or fall upon the plain law question, viz., *"Can a railroad be compelled to discontinue a free and impartial service simply because of its uesfulness to some of the class who patronize it."*

For the reasons we have given we think we may dismiss as being without foundation in fact the suggestion of the Inter-

state Commerce Commission that the hauling of the private cars necessarily interferes with the hauling of the Company's own cars. In the present case, however, we consider it very important to keep clear the elementary principles involved. For this reason we call it to the Court's attention that, even if the suggestion were sound, it could not affect the present controversy. If the hauling of private cars be as legitimate a part of the railroad's duty as the carriage of freight in its own cars, it is difficult to see how it can only perform one duty in subordination to another. If one man got railroad service in the carriage of coal, another man in the coal trade could not complain that the first man also got service in the hauling of grain or fruit and that the grain traffic of the railroad impared the efficiency of its coal traffic service. The Railroad is supposed to equip itself to furnish each service it undertakes to give. The Commission would probably reply that the difference in the present case lies in the fact that the hauling of *private coal cars* gives the shipper a commercial advantage *as a competing coal merchant.* This illustrates the fallacy underlying the whole position taken by the Commission, to wit, that the duty of the Railroad Company is not to extend to all shippers equal privileges to use the railroad, but to equalize the commercial situation of competing dealers. The equality required of a railroad is equality in the service it offers to furnish, not equality in the results to those who take it; still less, an adjustment of its arrangements to prevent one shipper from using the service because another cannot or does not wish to do so. It must allow every one the opportunity to make the same use of its facilities both in character and degree. Here its duty ends and "whatsoever is more than this cometh of evil."

II.

The receiving and hauling the private cars as private cars on the same terms for all does not constitute a discrimination —the Commission's order requires the Railroad Company to substitute for the equal treatment of all shippers, a discrimination in favor of one class of competing coal sellers.

The discussion of this question is made more difficult by the manner in which it is treated by the Commission's order and by the Courts that have reached the same conclusion. Whether they be right or wrong, they have consistently avoided any discussion of the real issues involved. Let us now try to state this.

The private cars have been purchased and put on the railroad for the sole reason that they would be the private cars of their owners, and not to be treated as part of the railroad's own equipment. That was the sole reason for their purchase, and without such agreement they would never have been put on. They were purchased in accordance with a practice formally established on the Baltimore and Ohio Railroad proper in 1852 and enjoined by a Statute of Maryland in 1878; in accordance with the charter obligations of the Pittsburgh and Connellsville Railroad Company, and other lines in Pennsylvania; and in accordance with long usage in the coal trade, both in the United States and England. The plain issue, then, is

> "Has a shipper whose business justifies it, the right to ship in his private cars and have them treated as his own"?

The same issue may be differently stated in two other ways, viz.,

> "Has a railroad company the right to maintain its road as a public highway, upon which all shippers may freely ship in their own cars, upon the same terms"?

and thus,

> "Has a railroad company the right to maintain, as a separate service, the furnishing of motive power to shippers who choose to ship in their own cars"?

Necessarily involved is this question:

> "Where a railroad has established two forms of service, open to all shippers on the same terms, can shippers, who make use only of one form, forbid the use of the other, not because it lessens or interferes with the service furnished them by the railroad, but solely because of its usefulness to the class that does use it"?

These constitute the same question, and for our present purpose it may be shortly stated thus:

> "Can a shipper put his own cars on the railroad, to be treated as his own and not as contributed to the railroad's car supply"?

The Commission avoid any decision of this question by ignoring entirely the purpose and understanding which led to the purchase of the cars and the putting of them on the road. They treat them as if contributed by the owner to the railroad as a part of its own car supply, using for all cars, private and other kinds, the elastic term "the available car supply" (Answer, top of page 32). This simply clouds the issue. Those cars are not available. If the agreement under which they were put on was improper, then the owner has no right to have them on the railroad. They can be made available by a new contract between their owner and the railroad, but that question is not before the Court. Of course, if the whole use of the cars to their owners is destroyed, the railroad might get them very cheaply, but we have nothing to do with that. The question, and the sole question is,

> "Is the agreement under which they have been

put on the road, and without which they would never have been bought, a legal or an illegal arrangement"?

The Commission in their treatment of this question followed an opinion of the Circuit Court of the United States for the Northern District of Illinois, in the case of Chicago and Alton Railroad Company *vs.* Interstate Commerce Commission, where the decision was reached by the simple process of first appropriating the cars and then deciding how they should be treated.

(1) *There is no complaint that there is discrimination in the service furnished. The complaint is that a service is furnished freely to all and that one shipper does not want it.*

The right to purchase a car and ship in it is the same to all. The complaint is that some shippers want to use this service, and some do not. These latter do not want their competitors to use it. There is no demand that the Railroad Company give something to one because it is given to another. The position of complainant is "You offer it to both of us; I do not want it; therefore you shall not give it to him." The difference is not in the action of the railroad but in the situation of the different shippers. The railroad is ordered to discontinue a service open to all on the same terms, because of its usefulness to the class that use it. The demand is made by a class that have the same privilege of using this service, but whom it better suits to use another service only. The railroad is asked to boycott one class of its shippers.

The Interstate Commerce Act contemplates the furnishing of different kinds of service, and that means service adapted to different uses of different shippers. The present order makes it unjust discrimination to offer the same service on the same terms to the same persons, if it suits some of them and others do not want them to have it. This is a new departure. This would greatly narrow down the function of a railroad. To furnish a service specially good for one class may affect a com-

peting class, but it is the very thing a railroad should do, so far as it can afford to do it. To forbid it in the interest of a class of dealers in a commodity, seems to be little short of holding that that class of dealers has an interest in a public agency superior to the interest of the public.

It is required by the Interstate Commerce Act that a railroad shall not discriminate between shippers using the same service under the same conditions. It is not required that the maintenance of different forms of service shall not result in discrimination, or in difference in result—that a form of service open to all shall not serve the purpose of one class of shippers so well that another class shall wish them not to have it. This is in contemplation. It is inseparable from the maintenance of a varied and so useful service.

That the usefulness of a form of service to a class of shippers that uses it, should be ground of complaint by another class that does not want it, seems a somewhat new doctrine. Of course, this whole difficulty is avoided if, like the Commission, we do not discuss the question of the right to have private cars, and treat the question as being "How is a private car to be counted when it is not a private car at all"?

(2) *By the Commission's order the railroad is forbidden to treat the shippers simply as shippers, with the same rights as to service, but is to treat them as competing dealers, and by actively discouraging one class of dealers equalize them in their power to compete.*

We have here a most interesting situation, viz., the Interstate Commerce Commission usurping the same power to pervert a public agency to the developing of private enterprises, the exercise of which by the railroads more than any other cause led to the creation of that Commission itself.

To neutralize the advantages that one dealer gets from more capital and an established business, to strengthen a weaker competitor, to control the enterprises of a territory and make its development more symmetrical, may be very desirable. We

recognize the high motives of the Interstate Commerce Commission, and believe that the same often inspired the managers of railroads in their misuse of this power. But it is a power that has been given to no one, and should not be allowed, and for the railroads to exercise it under the inspiration of the Commission is no less objectionable than when they did it by their unaided light.

We have here an order, passed by the Interstate Commerce Commission, fixing the relation of a railroad to the coal developments on its line at a time of car shortage. We venture to say that, if we exclude cases of intentional wrong-doing, it throws into the shade any misuse of their powers that the railroads themselves ever committed. It fixes that relation at such time as follows:

1. No consumer shall be allowed to ship coal at all from those mines.

2. The Railroad Company shall secure to the owners of mines upon its line the exclusive right to use the railroad for shipping coal.

3. In apportioning among said mine owners this exclusive right it shall adjust its service with a view to neutralizing the advantage that some of them would otherwise have from capital and established business. In other words, shall handicap the operators having established business in the interest of the new and struggling enterprise.

Let us consider these in turn.

1. No consumer can ship at all.

Foreign railroads and other consumers buy coal at the mines. It is loaded into their own cars f. o. b. and shipped to their own order. The Commission says that they can only do this by having these cars charged against the operator from whom they have bought the coal. In other words, the man from whom they bought the coal must be the shipper, and charged with the cars.

2. The Railroad Company shall secure to the mine owners the exclusive right to use its road for shipping coal.

All right to ship coal in private cars being withdrawn, an apportionment of the Company's own cars becomes an apportionment of the whole right to ship coal. These being apportioned among the operators, they are thus given the exclusive right to use the railroad for shipping coal. Their monopoly of this railroad service is guaranteed. The next step is that even the Railroad Company is not allowed to carry its fuel from one part of its line to another, except by charging the cars so used to a miner of coal.

3. In apportioning among said mine owners this exclusive right, it shall adjust its service with a view to neutralizing the advantages that some of them would otherwise have from capital and established business; in other words, shall handicap the operators having established business in the interest of the new and struggling enterprise.

The Baltimore and Ohio Railroad Company thinks this a fair statement of the result of the Commission's order. Whether it be or be not such fair statement, brings up what we consider the main question in this case, which is,

> DOES THE ORDER OF THE INTERSTATE COMMERCE COMMISSION ESTABLISH AN EQUAL TREATMENT OF SHIPPERS BY THE RAILROAD, OR DOES IT LEGALIZE A DISCRIMINATION BY THE RAILROAD IN FAVOR OF ONE CLASS OF DEALERS TO AID THEM, NOT AS SHIPPERS, BUT AS SELLERS OF COAL?

The act that is complained of takes place when the Railroad Company having distributed its own cars among those who ask for them, then accepts and hauls the car of the private car owner as a separate and additional service. Let us now call attention to a few features of this question:

a. Attention has been drawn entirely to the results that

flow from having the use of a private car, to the entire exclusion of the question of the right to have it. Precisely the same line of reasoning would justify the conclusion that the railroad had no right to allow one merchant who shipped by it to do more business than another was able to do.

In the opinion of the Commission, and in the opinion in the case of Chicago and Alton Railroad Company *vs.* Interstate Commission there is no attempt to discuss the right of the shipper to have his private car treated as such, or the fairness of the railroad's action as between shippers.

The reasoning is as follows:

> "The man who uses private cars gets certain advantages over the man who does not, therefore the right to have private cars should be taken from him."

The advantages enumerated are strictly commercial advantages, and precisely the same in character as those which come from doing a larger business. The same results as those attained by the Commission's order would be secured more effectively and on precisely the same principle, by an order that no shipper of coal or other commodity shall be allowed to ship ten cars where the business of another shipper only enables him to ship five. The atttitude of the railroad, the opportunity offered to use it, is the same to all. The only difference is in the different business circumstances of the shippers and the different forms of service they ask.

Let us now examine the advantages alleged to be secured by the owner of the private cars. They are enumerated by the Interstate Commerce Commission, in its Answer on pages 30-31. They are given under eight heads numbered respectively (*a*), (*b*), (*c*), (*d*), (*e*), (*f*), (*g*) and (*h*). Of these, (*h*) has been discussed. The others read as follows:

> "(*a*) The defendant, in rating mines for the purpose of establishing the percentage of available car equipment to which they are respectively entitled in

the daily distribution of cars during those periods when the demand for coal cars exceeds the supply, uses as a basis for such percentage distribution two factors: First, the physical capacity of the mine counted as 1, and Second, its commercial capacity counted as 2, and the latter is determined by the volume of shipments made by the mine during a certain period of each of the two years preceding the rating. The larger the number of cars assigned to a mine the greater will be the stimulus for development or increased production, as well as the greater the capacity of the mine for actual shipments. The method, therefore, of rating mines based on previous actual shipments as a predominating factor, taken in connection with the allotment to certain mines of foreign railway fuel cars and private cars, increases the rating of such mines and gives them larger percentages of cars in the general distribution during periods of car shortage not only than they would otherwise receive, but also than are received by other operators with mines of equal physical capacity to whom such cars are not assigned. The supply of car equipment of such favored mines is thus increased both by the actual number of foreign railway fuel cars and private cars assigned to them, and also by the increased rating resulting from such assignment.

"(*b*) The operator receiving the foreign railway fuel cars and private cars may develop or operate his mine to a fuller extent than can the operator of a mine of equal physical capacity who does not receive such cars.

"(*c*) As between mines of equal physical capacities, the amount of their respective commercial outputs or shipments is limited by car supply. The greater the car supply the greater will be the output, and the greater the output the less the cost of production per ton. The

operator, therefore, having the advantage in car supply, can make greater profits on his coal or undersell his competitors.

"(*d*) The fuller and more steady the supply of cars the greater is the number of days during a given period a mine can be run, and this cheapens the cost of production because of the fixed charges which accrue whether the mine is operated or not, such as the pay of engineers, firemen, foremen, and superintendents, who are employed and paid by the month (whether they work the entire month or not), the feed of mules and horses, the cost of ventilation and pumping of mine, and other expenses.

"(*e*) The contracts for coal between the mine operators and the complainant, are, as a rule, offered to operators at prices named or fixed by the railroad company, and such operators, by reason of the cars furnished them in addition to their full quota on general distribution, are enabled to produce and sell such coal cheaper than they otherwise could and, in fact, sell coal to the railroad company at a price lower than the prevailing price upon commercial coal, and the railroad company thus derives a profit to itself from its undue preference of such favored mine operators and the undue prejudice to which it subjects other operators not so favored.

"(*f*) Giving to certain mines 'foreign railway fuel' cars and 'private' cars in addition to their full quota of cars on general distribution when such additional cars are not given to other mines enables the former to run more nearly to their full capacity than can the latter and to give steadier employment, and thus secure a better class and fuller supply of operatives.

"(*g*) The operators of mines receiving 'foreign railway fuel' cars and 'private' cars are thereby enabled

to make contracts for the delivery of coal distributed over long periods to a greater extent than can the mine operators not so favored or preferred."

Of these the statement of the one marked (c) is somewhat misleading. It says "As between mines of equal physical capacities, the amount of their respective commercial outputs or shipments is limited by car supply." Of course, that which most limits the respective commercial outputs or shipments of mines is not car supply but the respective amounts of their business. There may be mines of equal physical capacity, the output or shipment of none of which is ever limited by car supply at all, being limited by lack of trade. When this was called to the attention of the witness Hale (page 97) he said "Well, I would like to state here that this is correct, but the car supply is only one limitation; there are a great many other limitations." We shall therefore presume that all the Interstate Commerce Commission meant was the real fact, viz.: that in times of car shortage lack of cars tends to lessen the amount of the output. With this explanation, let us for convenience state these advantages in short form:

(*a*) That additional cars secured by those owning private cars increase their business and so increase their rating.

(*b*) The additional cars enable the operator who has them to increase his business, and in doing so to more fully develop his mine.

(*c*) The additional cars enable the operator having them to increase his business, and the increase of his business lessens his cost of production, thus giving him a chance to sell cheaper.

(*d*) The additional cars by increasing his business will enable the operator having them to run his business more steadily and therefore more cheaply.

(*e*) The additional cars by enabling the operator having them to sell more cheaply will enable him to sell more cheaply to the Railroad Company itself.

(*f*) The additional cars, by enabling the operator having

them to do a larger and steadier business, enable him to give steadier employment and therefore employ a better class of men.

(*g*) The additional cars, by enabling the operator having them to do a larger and steadier business, enable him the better to make long time contracts.

This enumeration of advantages really reduces to one and the rest are the results that follow from it. The complaint is,

> "the Railroad Company, by allowing shippers to tender traffic loaded in their own cars, without regard to the distribution of its own, enables any one who chooses to buy private cars to have a better supply of cars when cars are short, than one who depends upon the railroad's cars only."

All the other alleged advantages flow from this, viz., the having a steadier car supply, by buying additional cars of one's own.

The advantages enumerated are the same in kind that would result from any other expenditure of capital by the operator in his business—the purchase of a better tipple, more mine cars, more miners, more efficient managers, better selling agents, etc. If he purchased extra boats and made increased shipments by a river the same results would flow, yet no competitor with fewer boats would try to hold him back from the use of his capital. It remains to be considered whether the fact that the operator looks to a railroad company to haul his cars shall deprive him of the benefit of his capital and enterprise.

b. The action of the Railroad Company which forms the basis of the complaint, is not an unfair division of its equipment among those who desire to use it. Its cars are distributed on a plan admittedly fair among those who apply for them. The question is what shall it do with the surplus equipment, which is not the object of competitive demand at all (motive power, tracks, etc.). The Court's order is that it shall not furnish any use of this to those who want it because there are others who do not.

We respectfully insist that the opportunity to use that surplus power ought to be free to any one who wants to use it, and for one shipper to complain that another is allowed to use it is precisely the same thing as for one shipper to complain that another derives an advantage over him by having purchased more boats and put them on a river. A private car as an effective thing may be expressed thus:

$$\text{Private car} = \begin{cases} \text{Individual money in its purchase.} \\ \text{Motive power, etc. of railroad for which there is no competitive demand.} \end{cases}$$

c. The service offered by the railroads in the hauling of private cars as such is one that has existed since railroads were first started. It has been a potent factor in the development of the business of the country. All enterprises have been started and maintained with the full knowledge that this right existed. The right to put one's own cars on the principal railroads of the country has been recognized by dealers and shippers precisely as the right to put boats on the Hudson or the Mississippi. There has been no more reason to discourage the one than the other—every reason to encourage both alike. The use of the private car has grown partly out of the fact that in many forms of traffic the shipper prefers to have a car of special construction. A much more influential reason for certain shippers using it has been the fact that the cars owned by a railroad are subject to many vicissitudes both because of the relation of the railroad with its patrons and its relation with other roads. We can have no stronger case of the proper need of it than the present. Large, long established coal companies, having time contracts with ocean steamers and big enterprises that are dependent on a steady supply of fuel, purchase cars that at least this part of their traffic may be free from the uncertainties, admittedly unavoidable, that beset the shipment in company's cars. It seems a bad policy to strike down this service, open to all, simply because the business of certain other shippers does not require it.

d. While we think that to enjoin the Railroad Company from furnishing this form of service is very objectionable, the reasons assigned for such act make it far more objectionable. The reasons assigned for enjoining the Railroad Company from furnishing this service, cipher down to this, *that it has been an especially useful service, and those who have chosen to patronize it have built up large business. In other words, that it has fulfilled precisely the purpose, and no other, that should actuate a railroad in establishing a service.*

The use of a railroad's motive power is precisely like the use of a river. The river may be used freely by any one who will purchase boats. The motive power may be used in precisely the same way by any one who will purchase cars. One dealer will reap the benefit that comes from purchasing the boats or the cars, or from the fact that the nature of his business justifies him in so doing. Another will not. That one dealer who did not wish to buy boats should ask that his competitor be forbidden to do so, would be regarded as ridiculous. It is difficult to see how the demand by one dealer that his competitor be forbidden to buy cars is any more just or reasonable. It would seem to be a rather gross form of discrimination.

It is the duty of a railroad in establishing any form of railroad service to offer it on the same terms to any one who will take it. *It is not its duty to see that different classes are equally able to use it. It is not its duty so to adjust the classes of service rendered that one class of dealers shall not be able to take more use of one than another does of another, or that one dealer shall not get an advantage by using two different forms of service. What the railroad has to consider is whether there be customers for the service offered.* If there be, it should try to serve them as effectively as possible. It does not have to consider how their rivals in trade will like it. For a railroad, without the order of the Interstate Commerce Commission, to discontinue a useful service at the desire of certain dealers, because they found that some of their competitors in

business were deriving too much good from it, would justly be regarded as an outrageous abuse of power by that railroad company. It is the duty of a railroad company to maintain equality in the rates for the same service. It is its duty to extend to all the same opportunity to use its service. For it to try to produce equality in the amount of its service that shall be used or in the results of its use to different classes of dealers is not doing its duty, but is a meddlesome usurpation. Every establishment of a service, every fixing of a schedule, every location of a station or shipping point is for the benefit and to the advantage of some class, and therefore gives them an advantage in their relation to some other class. That a railroad company should do what the Interstate Commerce Commission has ordered The Baltimore and Ohio Railroad Company to do, viz., withdraw a long established, well recognized and useful service, because it is useful to those who patronize it, *and because their competitors desire that the railroad actively discourage the users, would certainly not be proper.* It is a bad thing that a railroad company should go into partnership with the large, well established shipper. Is it any better that it should go into partnership with the inchoate enterprise, and attempt to paralyze, in the interest of such enterprise, the advantage which time, capital, and an established business have given to its competitor? Shall we not be needing a tribunal to prevent discrimination by the Interstate Commerce Commission?

SOME RESULTS.

If the action of the Commission be right in principle, it should, of course, not be changed by any consideration of its results. The direct results, however, sometimes throw light upon the nature of the decision, and we would ask the serious attention of the Court to the reach and scope of the Commission's order if sustained. The first result of this order is to benefit the new enterprises upon the line of The

Baltimore and Ohio Railroad Company, who deal in spot coal, at the expense of the established companies who take large time contracts on a small margin. It will benefit them by increasing the uncertainty and anxiety of the enterprises which require a steady supply of fuel. This will render the car shortages more frequent and more acute, and put the operators who have time contracts, at such times still more at the mercy of speculative enterprises. For this reason The Baltimore and Ohio Railroad Company is strongly opposed to it at this time. No ultimate extension of its powers will compensate it for a proceeding that disorganizes its largest source of traffic. It believes also that the proceeding which creates that disorder is without any justification, either in justice or policy.

But there is a much broader question to be considered by the Court. The Commission, very wisely, shrank from deciding that it was the duty of a railroad to fill all orders for cars at a percentage period. Very wisely, we say, because the overwhelming and uncontradicted evidence shows that the railroad could not possibly do so (Answer, Paragraph VIII, pages 31-32). And yet the order not only allows, but commands the Railroad Company at such times to refuse to recognize the private cars as such. The order, therefore, allows the railroad, when its own service as a carrier is necessarily imperfect, to require shippers to ship in that way alone. The railroad may therefore wipe out the free car system and compel shippers to ship only in its cars. The right to the use of a railroad as a public highway is wiped out. This vests a great power in the railroad companies. The Court will consider carefully whether the Commission have not done a revolutionary act, in order to deal with a purely imaginary evil.

The Court will see, of course, that the result of the Commission's order is to put the speculative owner of coal land in as good a position as the owner of land who has built up a business, by forbidding the latter to make the expenditure called for by his business and not by the business of the speculative owner; in other words, to use the railroad to destroy the value

of an established business in the interest of the owner of undeveloped coal land, by boycotting the former in his natural policy. The railroad has tried to stand impartially between these, and it believes its attitude will be recognized by the Court.

SYNOPSIS OF ARGUMENT.

A. Scope of Commission's Powers under Section 15.

The Interstate Commerce Commission, while having jurisdiction of the subject-matter under the broad powers given them by Sections 13 and 14 of the Interstate Commerce Act to stop violations of the Act, did not have power to prescribe regulations for two years in the future, that power being only given by Section 15 and these only in dealing with rates and with regulations and practices affecting rates.

B. The Merits of the Commission's Order.

I. The allowing the owner of private cars to use them as private cars does not interfere with or diminish the service rendered to those who use the system cars only. There has never been evidence or even complaint of such interference, and there exists no relation between the Company's own coal car equipment and the motive power and track equipment which has to take care of all cars that come on the highway. The grievance consists wholly in the usefulness of the private cars to those who have them.

II. The receiving and hauling the private cars as private cars on the same terms for all does not constitute a discrimination.

The Commission's Order requires the Railroad Company to substitute for the equal treatment of *all shippers*, a discrimination in favor of one class of competing *coal sellers*.

(1) There is no complaint that there is discrimination in the service furnished. The complaint is that a service is furnished freely to all and that one class of shippers do not want it. The Railroad Company is asked to discontinue a service free to all because of its usefulness to the class that use it.

(2) By the Commission's Order the Railroad Company is forbidden to treat the shippers simply as shippers, with the same rights as to service, and required to treat them as competing dealers and, by actively discouraging one class of dealers, equalize them in their power to compete.

The effect of this order is

> That no consumer shall ship.
>
> That the mine owners shall own the exclusive right to use the railroad for shipping coal.
>
> In apportioning this exclusive right among the mine owners, the Railroad must adjust its service so as to handicap those having capital and established business in the interest of the new and speculative enterprises.

(*a*) The Commission have discussed the *results* that flow from having the private car, to the exclusion of the question of the *right* to have it.

The results so discussed are strictly commercial advantages, the same in character as those which come from having a larger business, the same in character that would result from any other expenditure of the operator's capital in his business—better tipple, more mine cars, more miners, better managers, better selling agencies. The purchase of cars and putting them on the road, where there is no competition for motive power is the same that would come from putting more boats on a river. The order is precisely the same in purpose and effect as one that would forbid one merchant to do more business by the railroad than another.

(*b*) The action of the Railroad Company complained of is not an unfair division of its equipment among those competing for it; it is the furnishing on equal terms to all the surplus

equipment (motive power, track equipment, etc.) which is not the object of competitive demand.

(*c*) The service in private cars has existed since railroads started. It has been a great factor in the country's development. The right has been recognized by shippers precisely as the right to use the rivers and highroads. Large enterprises are dependent on it. It should not be stricken down because the business of certain dealers does not require it.

(*d*) The reason assigned for enjoining the Railroad Company from furnishing this service is in effect that it has been a very useful service, and has fulfilled precisely the purpose that should actuate a railroad in establishing a service.

The importance of a service should depend on its usefulness to those who use it, not the interest of those who do not.

The Commission's order, while not compelling the Railroad to fill all demands for coal cars, orders it to withdraw the right to the use of private cars, thus empowering the railroad to limit traffic to that carried in its own cars. Its effect also is to make the possession of undeveloped coal land as valuable as coal land coupled with established business by boycotting the owner of the established business and forbidding him to make the outlay which his business demands.

W. AINSWORTH PARKER,
W. IRVINE CROSS,
HUGH L. BOND, JR.

Solicitors for
The Baltimore and Ohio Railroad Company.

Office Supreme Court, U. S.
FILED
OCT 11 1909
JAMES H. McKENNEY,
Clerk.

No. 339.

In the Supreme Court of the United States.

OCTOBER TERM 1909.

THE BALTIMORE & OHIO RAILROAD COMPANY

v.

INTERSTATE COMMERCE COMMISSION.

ON CERTIFICATE OF THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

BRIEF FOR INTERSTATE COMMERCE COMMISSION.

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STATEMENT OF THE CASE.

This case comes to this court on the certificate of the circuit judges of the fourth judicial circuit, sitting as a circuit court in the district of Maryland. The Baltimore & Ohio Railroad Company on July 20, 1908, filed in said court a bill of complaint against the Interstate Commerce Commission, praying for an injunction restraining said Commission from enforcing a certain order, hereinafter set forth, which required complainant, in times of coal-car shortage, to count "foreign railway fuel cars" and "private cars" in determining the distributive share of cars to which each mine is entitled under its rating.

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On July 27, 1908, the Attorney-General of the United States filed with the clerk of the Circuit Court for the District of Maryland his certificate that the suit, in his opinion, was one of general public importance and requested that the case be assigned for hearing before three circuit judges. (Rec., p. 24.)

On August 22, 1908, complainant filed a petition for an order to set for hearing its application for preliminary injunction.

On September 19, 1908, the defendant filed its answer.

On September 22, 1908, the application for preliminary injunction was argued by counsel and submitted to the court, and on September 23, 1908, the court unanimously denied said application, and held that the Interstate Commerce Commission had authority under the provisions of section 15 of the interstate-commerce act as amended—

> to consider and dispose of the matters presented by the petition in said proceeding filed before said Commission and to examine into and decide whether or not any undue preference and unlawful discrimination forbidden by sections 2 and 3 of said interstate-commerce act, or elsewhere in said act, had been practiced by said railroad company in its dealings with said Rail & River Coal Company.

The court further held, in deciding said application, that the facts adduced before the Interstate Commerce Commission were not shown to be insufficient to sustain said order, and the application for

the preliminary injunction was thereupon denied. (Rec., p. 55.)

On October 27, 1908, the complainant filed its replication to the answer, and testimony on behalf of the complainant was taken, as appears in the transcript of record, pages 57 to 117.

On December 14, 1908, Hon. Nathan Goff, senior circuit judge of the Circuit Court of the United States for the District of Maryland, signed the following order:

> In the Circuit Court of the United States for the District of Maryland.
>
> | | |
> |---|---|
> | Baltimore & Ohio Railroad Company *v.* Interstate Commerce Commission. | Equity docket, F. No. 54. |
>
> This cause came on this day to be further heard, was argued by counsel, and the court having fully considered the bill, answer, depositions, and other papers filed herein, the judges sitting finding themselves divided in opinion as to the decree that should be entered herein,
>
> It is now ordered that in accordance with the act of Congress applicable hereto, that this case be certified for review to the Supreme Court of the United States.
>
> (Signed) NATHAN GOFF,
> *Senior Circuit Judge, Presiding.*
>
> (Rec., p. 119.)

And thereupon the clerk of said court transmitted a transcript of the record and proceedings of the cause aforesaid to this court.

The order of the Commission which the Circuit Court was asked to enjoin resulted from a complaint filed before it November 8, 1907, by the Rail & River Coal Company, a corporation under the laws of West Virginia, owning and operating a coal mine on the Newark division of complainant's railway, alleging violations of the provisions of the act to regulate commerce by complainant in the distribution of coal cars among the operators of coal mines along the line of complainant. The complaint particularly charged the following violation of law:

That the Baltimore & Ohio Railroad Company unjustly and unduly discriminated against the complainant, the Rail & River Coal Company, and other owners and operators of coal mines engaged in shipping coal to interstate points in that while said railroad company, during periods of coal-car shortage, from day to day distributed its cars to be loaded with coal from mines along its lines according to ratings established by it as to the several and respective capacities of such mines, it did not, in such distribution, take into account or consider foreign railway-fuel cars (being cars consigned by other railroads to certain mines upon the lines of the Baltimore & Ohio Railroad Company for railway fuel), and did not take into account or consider private cars (being cars owned, or claimed to be owned, by operators of coal

mines along the lines of the Baltimore & Ohio Railroad Company, or by consignees, and furnished by such consignees to said operators), and that such foreign railway-fuel cars and such private cars were delivered to such mines in addition to the distributive shares of cars to which said mines might be entitled under the system of distribution then in force.

Thereafter the Baltimore & Ohio Railroad Company filed its answer before the Interstate Commerce Commission, denying that in its system of car distribution it had violated any of the provisions of the act to regulate commerce, and challenged the jurisdiction of the Commission to make any order respecting the distribution of cars to coal mines.

After a due investigation and full hearing, at which testimony and argument, both orally and by brief, had been presented to the Commission, it made its report and issued the order which is involved herein, to wit:

ORDER.

Rail and River Coal Company *v.* Baltimore & Ohio Railroad Company.	No. 1322.

This case being at issue upon the complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on

the date hereof, made and filed a report containing its conclusions thereon:

It is ordered, That the defendant, the Baltimore & Ohio Railroad Company, be, and it is hereby, notified and required, on or before the 1st day of August, 1908, to cease and desist, and during a period of at least two years thereafter to abstain, from maintaining and enforcing, with respect to interstate shipments of coal, the present practice or regulation of failing or refusing, in times of coal-car shortage, to count railway fuel cars and leased or so-called private coal cars against the distributive shares of available system coal cars which the coal operators, to whom said leased or so-called private coal cars belong or said foreign railway fuel cars are consigned, are entitled to according to the ratings of their respective mines.

It is further ordered, That said defendant be, and it is hereby, notified and required to establish, on or before said 1st day of August, 1908, and during a period of at least two years thereafter, to maintain and enforce, with respect to interstate shipments of coal, a practice or regulation which, in times of coal car shortage, shall require foreign railway fuel cars and leased or so-called private cars to be counted against the distributive shares of available cars to which the respective operators, to whom the leased or so-called private cars belong or foreign railway fuel cars are consigned, are entitled according to the respective ratings of their mines; and that the said leased or so-called private cars shall always be delivered to the operators owning them and the said for-

eign railway fuel cars always be delivered to the operators to whom they are consigned by said foreign railway; and that in case said leased or so-called private or foreign railway fuel cars so delivered to the operator owning them or to whom they have been consigned are not sufficient to fill out his distributive share of available system cars, enough system cars are to be added to make up his share according to the rating of his mine as fixed and determined by the system of mine rating on the lines of the defendant.

The bill of complaint attacks the order of the Commission, in substance, on the following grounds:

1. That the order complained of is not one which the Commission is authorized to make under section 15 of the act to regulate commerce.

2. That the Commission made the order complained of without consideration of the facts legally proved and by reason of an erroneous assumption of law as well as from evidence adduced before the Commission in other proceedings in which the railroad was not a party.

3. That the Commission erred in holding that the regulations governing car distribution of the railroad company were unlawful, and in ordering a change to those prescribed by the Commission.

4. That to comply with the Commission's order would compel the railroad company to violate the third section of the act to regulate commerce, by giving undue and unreasonable preference and ad-

vantage and undue and unreasonable prejudice and disadvantage as between shippers of coal.

In its answer the Commission set forth that as a result of the investigation of the matters complained of it had found that the regulations of the railroad company, whereby private cars and foreign railway fuel cars were not counted in the distribution of available equipment, constituted an undue preference and advantage to the mine operators receiving such private and foreign railway fuel cars, and subjected other operators to whom such cars were not assigned to an undue and unreasonable prejudice and disadvantage. The basis for the finding of the Commission is set forth in Paragraph VII of the answer (Rec., p. 30) and in substance is as follows:

> Assigning such cars without counting them in the distribution of available equipment results, under the method of rating then in effect, in increasing the rating of such favored mines and giving to such favored operators larger percentages than they would otherwise receive. The mine rating was determined by taking the physical capacity of the mine during four months of the year, and its commercial capacity as determined by the volume of shipments made by the mine during certain periods in each of the two years preceding the allotment; these three amounts were added together and divided by 3, so as to give an average upon which the mine was rated. The mine operator who has a full supply of cars is able to and does operate his

mine to a fuller extent than the operator of a mine of equal physical capacity not receiving such cars. The greater the car supply the greater the commercial output, with a consequent increased commercial production, which constitutes a large element of the method of mine rating. The operator having a full and steady supply of cars is able to produce his coal at a less cost per unit than is the operator not having such full and steady supply of cars. The cost of production is cheapened, because the mine is able to maintain a steady force of workmen, and is able to take advantage of the fixed charges which accrue whether the mine is operated or not, and is able to avoid other incidental expenses, such as storage, etc. Contracts for coal furnished the railroad company are at the price fixed by it, certainty of obtaining cars being one of the considerations for the price, which is usually less than the prevailing commercial price, the railroad thereby profiting by its failure to count such cars. Operators receiving foreign railway fuel cars and private cars are thereby enabled to make contracts for the delivery of coal over long periods to a greater extent and advantage than are operators not receiving such cars. The foreign railway fuel cars and private cars are hauled by the motive power of the railroad and in times of car shortage lessen the facilities afforded to all operators and thereby lessen those furnished to mine operators to whom such cars are not assigned.

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POINTS.

1. This case is improperly brought to this court; the certificate should be dismissed and the cause remanded to the Circuit Court with instructions to render a decree in accordance with the opinion of the majority of that court.

2. The Interstate Commerce Commission has authority to examine into and decide whether or not a railroad company is violating any of the provisions of the interstate commerce act with respect to furnishing cars for transportation, to make an order requiring the carrier to cease and desist from such violation, and to prescribe what regulation or practice with respect to such transportation is just, fair, and reasonable.

3. The practice of the Baltimore & Ohio Company in this case, in failing to count "foreign railway fuel cars" and "private cars" against the distributive shares of the coal operators to whom said two classes of cars are assigned, is a violation of the interstate commerce act, gives to such operators an undue and unreasonable preference and advantage, and subjects to an undue and unreasonable prejudice and disadvantage other operators to whom such cars are not assigned.

4. The evidence introduced before the Circuit Court does not tend to show that the Interstate Commerce Commission acted fraudulently or failed to comply with the terms of the statute as to its procedure, or that the order confiscates property. Such testimony is inadmissible, since the court will not

restrain the enforcement of an order properly made unless the same is shown to invade some constitutional right.

ARGUMENT.

I.

JURISDICTION OF THIS COURT.

This case is improperly brought to this court; the certificate should be dismissed and the cause remanded to the Circuit Court with instructions to re[illegible] a decree in accordance with the opinion of the majority of that court.

The judges of the Circuit Court held the view that whenever there is any disagreement in the Circuit Court as to the decree to be entered the case should be sent here by certificate under the so-called "expediting act" (32 Stat., 823), upon the theory that a failure of unanimity constitutes a division of opinion within the meaning of that act, which provides "In the event the judges sitting in such case shall be *divided in opinion*, the case shall be certified to the Supreme Court for review in like manner as if taken there by appeal."

The expediting act of February 11, 1903 (32 Stat., 823), provides:

> (1) That in any suit in equity pending or hereafter brought in any Circuit Court of the United States under the act entitled "An act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety, "An act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, or any other acts having a like purpose that hereafter may be enacted wherein the United

States is complainant, the Attorney-General may file with the clerk of such court a certificate that, in his opinion, the case is of general public importance, a copy of which shall be immediately furnished by such clerk to each of the circuit judges of the circuit in which the case is pending. Thereupon such case shall be given precedence over others and in every way expedited, and be assigned for hearing at the earliest practicable day *before not less than three of the circuit judges of said circuit, if there be three or more; and if there be not more than two circuit judges, then before them and such district judge as they may select. In the event the judges sitting in such case shall be divided in opinion, the case shall be certified to the Supreme Court for review in like manner as if taken there by appeal as hereinafter provided.*

SEC. 2. That in every suit in equity pending or hereafter brought in any Circuit Court of the United States under any of said acts, wherein the United States is complainant, including cases submitted but not yet decided, *an appeal from the final decree of the circuit court will lie only to the Supreme Court* and must be taken within sixty days from the entry thereof: *Provided*, That in any case where an appeal may have been taken from the final decree of a Circuit Court to the Circuit Court of Appeals before this act takes effect, the case shall proceed to a final decree therein, and an appeal may be taken from such decree to the Supreme Court in the manner now provided by law.

The Hepburn Act, amending the Interstate Commerce Law (June 29, 1906, 34 Stat., 584, 592), provides:

> SEC. 16. The venue of suits brought in any of the Circuit Courts of the United States against the Commission to enjoin, set aside, annul, or suspend any order or requirement of the Commission shall be in the district where the carrier against whom such order or requirement may have been made has its principal operating office, and may be brought at any time after such order is promulgated. * * *
>
> * * * * *
>
> The provisions of "An act to expedite the hearing and determination of suits in equity, and so forth," approved February eleventh, nineteen hundred and three, shall be, and are hereby, made applicable to all such suits, including the hearing on an application for a preliminary injunction, and are also made applicable to any proceeding in equity to enforce any order or requirement of the Commission, or any of the provisions of the act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, and all acts amendatory thereof or supplemental thereto. It shall be the duty of the Attorney-General in every such case to file the certificate provided for in said expediting act of February eleventh, nineteen hundred and three, as necessary to the application of the provisions thereof, and upon appeal as therein authorized to the Supreme Court of the United States, the case shall have in such court priority in hearing

> and determination over all other causes except criminal causes. * * * An appeal may be taken from any interlocutory order or decree granting or continuing an injunction in any suit, but shall lie only to the Supreme Court of the United States: *Provided further*, That the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court over all other causes, except causes of like character and criminal causes. (34 Stat., 584, 592.)

In this case the Attorney-General duly filed the certificate provided for in the above act. The case was heard by the two circuit judges for the Fourth Judicial Circuit—Goff and Pritchard—and Morris, district judge, and upon the hearing the three judges, claiming to be divided in opinion, certified the case to this court. As judgment could have been rendered by a majority of the court, a final decree should have been entered in accordance with the opinion of such majority and the case should then have come to this court by appeal. Instead, the whole case, without opinion or decree, has been transferred to this court by certificate for review.

It is submitted by the Government that the so-called "Expediting Act" properly construed contemplates the certification to this court of the classes of cases mentioned only when the judges sitting in the Circuit Court are "equally" divided in opinion and consequently are unable to enter an affirmative decree and not when there is a division of two to one

or any other unequal division, in which case it is possible to enter a decree in the lower court and to bring the record up with an assignment of errors.

Upon the request of counsel who appeared for the Interstate Commerce Commission in the court below and who appears in this court as a special assistant to the Attorney-General, the statement is made that such counsel was and is of the opinion that the words "divided in opinion," as used in the so-called expediting act, mean any division.

The Attorney-General, however, believes that a construction of the expediting act which transfers to this court for decision in the first instance a case in which the lower court had power to enter a decree, is inconsistent with the distinctive functions of the appeal and the certificate; and feels, therefore, that his duty to this court requires him to urge that the certificate be dismissed and the case remanded to the Circuit Court with instructions to enter a decree in accordance with the opinion of the majority of said court.

The purpose of Congress in passing the act, as shown by the title, was to expedite the hearing and determination of the classes of cases enumerated therein. The title of the act is significant: "An act to expedite the hearing and determination of suits in equity pending or hereafter brought under the act of July second, eighteen hundred and ninety, entitled 'An act to protect trade and commerce against unlawful restraints and monopolies,' 'An act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, or any other

acts having a like purpose that may be hereafter enacted." The first section, after providing for the filing of a certificate by the Attorney-General stating that the case is of general public importance, declares—

> Thereupon such case shall be given precedence over others and in every way expedited, and be assigned for hearing at the earliest practicable day, before not less than three of the circuit judges of said circuit, if there be three or more; and if there be not more than two circuit judges, then before them and such district judge as they may select. In the event the judges sitting in such case shall be divided in opinion, the case shall be certified to the Supreme Court for review in like manner as if taken there by appeal as hereinafter provided.

To secure expedition and at the same time careful consideration it was necessary to provide some method which should eliminate the intermediate appellate court and yet increase the dignity of the court of original jurisdiction. Therefore Congress declared that the cases should be heard, in the first instance, "before not less than three of the circuit judges" of the circuit in which the suit should be brought, "if there be three or more," with an appeal directly to this court. This arrangement insured full consideration and rendered more probable a correct determination by the court of original jurisdiction. So long as there were only three circuit judges in a circuit the court would consist of

those three judges, and in such cases the appeal provision of the second section would be sufficient to secure a review by this court, because a court consisting of an uneven number of judges can always enter a final decree which can be appealed from. But, at the time of the enactment of this law, two circuits (the second and eighth) had four circuit judges, and it was probable that others, through increase of business, would in time likewise have four; this has actually transpired in the seventh circuit. Therefore the danger that in a case brought in a circuit with four circuit judges the judges might be equally divided in opinion and unable to enter a final decree rendered necessary the incorporation into the act of the provision that on a division of opinion the case should be certified to the Supreme Court, as though appealed.

That this was the purpose of Congress in providing the use of the certificate appears from a reference to earlier acts in which Congress for a like reason had allowed a certificate.

It is a settled rule of statutory construction that, in order to ascertain the true meaning of a doubtful provision used in a law, resort may be had to prior acts containing the same provision which have received judicial construction. This rule Mr. Justice Brown, in *Hamilton* v. *Rathbone* (175 U. S., 414, 419), stated as follows:

> The real rule is perhaps settled that when a statute is of doubtful meaning and susceptible upon its face of two constructions, the court

> may look into prior and contemporaneous acts, the reasons which induced the act in question, the mischiefs intended to be remedied, the extraneous circumstances, and the purpose intended to be accomplished by it, to determine its proper construction.

See also *Kepner* v. *United States* (195 U. S., 100, 121, 124).

The first act of Congress providing for a certificate to this court is section 6 of the "Act to amend the judicial system of the United States," April 29, 1802, which provided (2 Stat., 159):

> That whenever any question shall occur before a Circuit Court, upon which the *opinions of the judges shall be opposed*, the point upon which the disagreement shall happen shall, during the same term, upon the request of either party, or their counsel, be stated under the direction of the judges, and certified under the seal of the court to the Supreme Court, at their next session to be held thereafter; and shall, by the said court, be finally decided. And the decision of the Supreme Court, and their order in the premises, shall be remitted to the Circuit Court, and be there entered of record, and shall have effect according to the nature of the said judgment and order: *Provided*, That nothing herein contained shall prevent the cause from proceeding if, in the opinion of the court, further proceedings can be had without prejudice to the merits. * * *

Before the passage of this act there had been no necessity for such a provision of law, because

the Circuit Courts had theretofore been composed of *three* judges, and the justices of the Supreme Court changed their circuits, so that no difference of opinion arising between them could prevent a decision (1 Stat., 74). But the act of 1802, of which section 6 is a part, reduced the Circuit Court to *two* judges, and therefore it became necessary to provide for the contingency of the two judges constituting the Circuit Court being opposed in opinion. The result was section 6 quoted above.

> *United States* v. *Daniel*, 6 Wheat., 542, 547; *Ex parte Milligan*, 4 Wallace, 2, 111; *Insurance Company* v. *Dunham*, 11 Wallace, 1, 21; *Waterville* v. *Van Slyke*, 116 U. S., 699, 704; *United States* v. *Rider*, 163 U. S., 132, 136; *Paquete Habena*, 175 U. S., 677, 684; *Jewell* v. *Knight*, 123 U. S., 426; and *Chicago, Burlington & Quincy Ry.* v. *Williams*, 205 U. S., 444, where all the cases are reviewed.

In *United States* v. *Daniel* (*supra*) Mr. Chief Justice Marshall said:

> Previous to the passage of that act (of 1802) the circuit courts were composed of *three* judges, and the judges of the Supreme Court changed their circuits. *If all the judges were present, no division of opinion could take place.* If only one judge of the Supreme Court should attend, and a division should take place, the cause was continued until the next term, when a different judge would attend. Should the same division continue, there would then be the opinion of two judges

> against one; and the law provided that in such case that opinion should be the judgment of the court. But the act of 1802 made the judges of the Supreme Court stationary, so that the same judge constantly attends the same circuit. This great improvement of the preexisting system was attended with this difficulty: The court being always composed of the same two judges, any division of opinion would remain and the question would continue unsettled. To remedy this inconvenience the clause under consideration was introduced.

Again, in *Insurance Company* v. *Dunham* (*supra*), Mr. Justice Bradley said, speaking of an act which had increased the number of circuit judges but provided that two should sit together:

> * * * There is nothing in this act which alters the powers of the court or obviates the difficulty which a certificate of division was intended to meet. That difficulty arose from the fact that the court was constituted of two judges, between whom a difference of opinion would be likely often to occur, and thus block the wheels of justice. Other things being equal, a division of opinion is far more probable between *two* persons than is an equal division between any other even number of persons. This renders it desirable, when a court consists of the former number, to have some method provided for overcoming the intrinsic difficulty. Such a method was provided by the act of 1802 to meet the then constitution of the court, which consisted of a justice of the Supreme Court and the district judge.

The act of 1802 was superseded by the act of June 1, 1872 (17 Stat., 196), which provided:

> That whenever, in any suit or proceeding in a Circuit Court of the United States, being held by a justice of the Supreme Court and the circuit judge or a district judge, or by the circuit judge and a district judge, *there shall occur any difference of opinion between the judges* as to any matter or thing to be decided, ruled, or ordered by the court, the opinion of the presiding justice or the presiding judge shall prevail, and be considered the opinion of the court for the time being; but when a final judgment, decree, or order in such suit or proceeding shall be entered, if said judges shall certify, as it shall be their duty to do if such be the fact, that they differed in opinion as to any question which, under the act of Congress of April twenty-ninth, eighteen hundred and two, might have been reviewed by the Supreme Court on certificate of difference of opinion, then either party may remove said final judgment, decree, or order to the Supreme Court, on writ of error or appeal, according to the nature of the case, and subject to the provisions of law applicable to other writs of error or appeals in regard to bail and supersedeas.

The difference between the act of 1802 and the act last quoted was that under the former act the questions upon which the judges differed could be certified to this court before judgment, whereas under the latter act the opinion of the presiding judge prevailed for the time being, and after the

entry of a final judgment and a certificate of division of opinion the case came to this court on writ of error or appeal. But the constitution of the Circuit Court and the consequent necessity for the provision under consideration remained the same.

The act of June 1, 1872, was in turn supplanted on June 22, 1874, by sections 650, 652, and 693 of the Revised Statutes, by which its provisions were restricted to civil suits and proceedings (*United States* v. *Rider*, 163 U. S., 132, 136); and by sections 651 and 697 by which the provisions of the act of 1802 were reenacted as to criminal cases. (*United States* v. *Sanges*, 144 U. S., 310; *United States* v. *Rider*, *supra*.)

Sections 650, 652, and 693 of the Revised Statutes are as follows:

> SEC. 650. Whenever, in any civil suit or proceeding in a Circuit Court held by a circuit justice and a circuit judge or a district judge, or by a circuit judge and a district judge, there occurs any difference of opinion between the judges as to any matter or thing to be decided, ruled, or ordered by the court, the opinion of the presiding justice or judge shall prevail, and be considered the opinion of the court for the time being.
>
> SEC. 652. When a final judgment or decree is entered in any civil suit or proceeding before any Circuit Court held by a circuit justice and a circuit judge or a district judge, or by a circuit judge and a district judge, in the trial or hearing whereof any question has occurred upon which the opinions of the judges were

opposed, the point upon which they so disagreed shall, during the same term, be stated under the direction of the judges, and certified, and such certificate shall be entered of record.

SEC. 693. Any final judgment or decree, in any civil suit or proceeding before a circuit court which was held, at the time, by a circuit justice and a circuit judge or a district judge, or by the circuit judge and a district judge, wherein the said judges certify, as provided by law, that their opinions were opposed upon any question which occurred on the trial or hearing of the said suit or proceeding, may be reviewed and affirmed or reversed or modified by the Supreme Court, on writ of error or appeal, according to the nature of the case, and subject to the provisions of law applicable to other writs of error or appeals in regard to bail and supersedeas.

These sections restricted the act of 1872 to civil suits; as before in case of a division of opinion between the *two* judges sitting, the opinion of the presiding judge prevailed for the time being, and the point upon which they disagreed was certified and entered of record; the case then came to this court by writ of error or appeal. Sections 651 and 697 of the Revised Statutes (June 24, 1874) provided for the certification of questions of law in criminal proceedings from the Circuit Court to the Supreme Court whenever any question occurred upon which the judges were "divided in opinion." In all these earlier statutes, regulating both civil and criminal procedure, the use of the certificate depended of

necessity upon there being an equal division of the court and was restricted to questions of law.

By section 6 of the judiciary act of March 3, 1891, establishing circuit courts of appeals (26 Stats., 826, ch. 517), it was provided:

> SEC. 6. * * * Excepting that in every such subject within its appellate jurisdiction the Circuit Court of Appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision.
>
> And thereupon the Supreme Court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the circuit courts of appeals in such case, or it may require that the whole record and cause may be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal.
>
> And excepting also that in any such case as is hereinbefore made final in the circuit court of appeals it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court.

The foregoing act repealed the prior acts concerning certification of cases by the circuit court (*United States* v. *Rider, supra*).

Prior to the act of 1891, the certificate was made necessary by reason of the circuit court being composed of an equal number of judges; for the same reason, Congress, realizing that under the provisions of the expediting act the circuit court may be held by four judges, included this provision in order that the wheels of justice may not be blocked where the four judges are equally divided in opinion.

Appeal is the regular method for bringing the whole case from the lower to the appellate court, whereas the usual function of a certificate is the certification of a particular question of law to the higher court for decision. In all the statutes cited above the certificate has been restricted to its customary use as a method of bringing single definite propositions or questions of law to the appellate court for decision. A construction of the expediting act which gives the same function to the certificate as to the appeal is at variance with the established and distinctive uses of the appeal and certificate.

The second section of the act under consideration provides for an appeal to this court from the final decree of the Circuit Court. Did Congress, by the use in the first section of the phrase "divided in opinion," intend to limit the use of the appeal provision of the second section so as to include only those cases in which the judges sitting were agreed and entered a unanimous final decree? If Congress had no intention of limiting the use of the appeal, a final decree should be entered where a *majority* of the court is of one opinion as well as where the court is unanimously

agreed, and the appeal provision should be resorted to for taking up the case.

To repeat, the first section of the act provides: "In the event the judges sitting in such case shall be divided in opinion, the case shall be certified to the Supreme Court for review in like manner as if taken there by appeal, as hereinafter provided." An interpretation that this means *any* division of opinion is so opposed to the apparent object of its adoption, as ascertained from prior acts containing the provision for a certificate, which were passed under similar conditions as to the constitution of the court, and is so inconsistent with the provision for appeal in the second section of the act, that it can not fairly be said that a literal construction would carry out the intention of Congress in enacting the law. The rule of construction which authorizes the limiting of general expressions in a statute so as not to force a narrow, strained, and unnatural construction upon a subsequent section has many times been plainly expressed by this court.

In *Pennington* v. *Coxe* (2 Cr., 33, 52) Mr. Chief Justice Marshall gave expression to it in this language:

> That a law is the best expositor of itself; that every part of an act is to be taken into view for the purpose of discovering the mind of the legislature; and that the details of one part may contain regulations restricting the extent of general expressions used in another part of the same act, are among those plain rules laid down by common sense for the exposition of

statutes which have been uniformly acknowledged.

See also:

Alexander v. *Mayor, etc.*, 5 Cr., 1, 7.
Peck v. *Jenness*, 7 How., 612, 623.
Brown v. *Duchesne*, 19 How., 194.
Bernier v. *Bernier*, 147 U. S., 242, 246.

The second section of the expediting act does not state that the use of the appeal shall be limited to cases where the lower court is unanimously agreed. The presumption is that, in the absence of any such express limitation, Congress intended that it should operate from majority as well as unanimous decrees. Such a construction of the second section accords with universal practice concerning appeals, whereas any other construction necessitates a radical departure from the policy of the law that a majority of a court may enter a decree which can be appealed from.

An interpretation to the effect that "divided in opinion" means *any* division of opinion would lead to another illogical construction of the last sentence of section 1. It is clear that the Supreme Court will refuse to consider a case unless the lower court has rendered a decision and entered a decree for the appellate court to consider, when it was within the power of the lower court to have decided. There must be a decree and an assignment of errors for the appellate court to examine. If the lower court was divided two and one, the Supreme Court would not allow it to certify the whole case and record without decision, for, on such a division, it would be the

duty of the Circuit Court to enter a decree. But if we should construe the last sentence of section 1 as applying to divisions by the court, two to one, and as requiring a certification of the record after decree with an assignment of errors, then the method of review reached by section 1 in cases of division two to one would be exactly the same as that granted by section 2. In such a case the record would go up just as if by appeal. It is evident that, in order to give to the two sections an interpretation which will make them supplemental to each other and not overlapping, the last sentence in section 1 must be construed as indicating the method to be adopted in bringing the case to the Supreme Court only when the circuit judges are "equally" divided in opinion, so that they are without power to render a decree, and when there can be no assignment of errors.

This court itself uses the word "divided" in the sense of "equally" divided. During the last term, in case No. 238, *Chicago & Alton Railroad Company* v. *United States* (also cases Nos. 239 and 240), the words were so used (212 U. S., 563). That was a criminal case which came to the Supreme Court on a writ of certiorari on the petition of the railroad company. Mr. Justice Moody did not sit, and the court being divided four and four, the judgment below was affirmed. The announcement of the court reads:

> Judgments affirmed by a divided court.

Here, then, we have the use by the Supreme Court of the word "divided" in the sense of "equally divided."

So also the court divided four and four in *Eidman* v. *Tilghman* (203 U. S., 580), a tax case, which came to the Supreme Court on writ of certiorari and was argued in October, 1906, after Mr. Justice Brown left the bench and before Mr. Justice Moody was appointed. The decision of the court was announced as follows:

> Judgment affirmed with costs by a divided court, and cause remanded, etc.

A construction of the statute which gives to the words "divided in opinion" the sense of an "equal" division and accords to the appeal provision of section 2 the effect it has always had without attempting to restrict that method of review by this court, is a construction consistent with the previously ascertained and judicially determined uses of both methods of review, whereas a literal interpretation of the phrase in question not only confers upon the certificate an office it has never before performed, but restrains and narrows the language of the second section of the act by limiting the customary use of an appeal. We do not think that Congress intended by such general language to change the respective spheres of action of the certificate and appeal, but rather intended that each mode of review should be used in the cases to which it had theretofore had application—the certificate in cases where, by reason of

the constitution of the court below, no decision can be rendered, and the appeal in all cases in which a final decree can be entered.

The language in *Claflin* v. *Commonwealth Insurance Company* (110 U. S., 81, 92) is in point:

> We are bound to take the words of the law in their usual, ordinary, literal meaning, and to construe the two provisions in the different sections in the same sense which, in previous statutes, has uniformly been given to them, and not invent a new application and relation of the two clauses without any indication whatever on the part of Congress to that effect.

As Congress has given no indication that it intended to narrow the use of the appeal, we are not at liberty to invent any new application of it, but in each provision of this act we must accord to the terms "certificate" and "appeal" the meaning which the two methods of review have heretofore had.

A construction of the statute which sends to this court cases in which a majority of the lower court is agreed is inconsistent with other acts of Congress relieving this court of much unnecessary appellate jurisdiction.

It may finally be said that a construction of the expediting act which would require the certification to this court of all cases in which there was any division in the court below, would render that act unconstitutional, because, if so interpreted it would confer original jurisdiction upon this court in cases

in which the Constitution has not given such original jurisdiction.

White v. *Turke*, 12 Pet., 238.
Webster v. *Cooper*, 10 How., 54.
U. S. v. *Perrin*, 131 U. S., 55.
Jewell v. *Knight*, 123 U. S., 452.

The only justification for sending any case to this court, without a decision below, is that the judges below are equally divided and are, therefore, unable to render a decision. Such a situation would "block the wheels of justice," as Mr. Justice Bradley said in *Insurance Co.* v. *Dunham* (11 Wall., 21). But in cases in which the judges below are not equally divided a decision of the whole case may and must be rendered. It thus appearing that a construction of the expediting act which would necessitate the certification to this court of every case in which the judges below are not unanimous, would render that act unconstitutional, said construction ought not to be adopted, but the words "divided in opinion" should be given the meaning they have always had in our judicial history.

The construction which the Government here places upon the provisions of the expediting act has met with judicial approval in the case of the *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, decided by Circuit Judges Pardee, McCormick, and Shelby of the Fifth Circuit (166 Fed., 134). In that case after the court, in a decree made by a majority of the judges, had overruled the motion for a temporary injunction, the complainants moved to

certify the case to the Supreme Court on the ground that the judges had differed in opinion, two of the judges having been of the opinion that the motion for an injunction should be overruled and one of the opinion that the motion for an injunction should be granted and the order refusing the injunction having been entered by a majority of the judges. The court unanimously overruled the motion for a certificate, holding that the term "divided in opinion" is applicable only to cases where there is such a division of opinion that it is impossible to enter a decree. Circuit Judge Pardee said that after final decree the case may be carried by appeal to the Supreme Court, "and the only office left for the certificate is in the contingency that the judges shall be unable to agree on a final decree." He also said (p. 136):

> The sixteenth section of the interstate commerce act, as amended (and above mentioned), provides for an appeal to the Supreme Court from an interlocutory order granting or continuing an injunction, but no appeal from an order refusing a preliminary injunction is provided for in that act. Under the expediting act per se, when the judges were divided in opinion, the case was to be certified to the Supreme Court in like manner as by the appeal thereinafter provided. *We have suggested that this provision could only be of value in a case where the division of opinion among the judges on final hearing was such as to prevent a final*

> *decree.* The question now is whether the same reasoning is to apply in cases where the judges differ in opinion as to whether an application for a preliminary injunction shall be granted or refused, but where the majority of the judges can and do render a decree. If such decree grants the injunction the Interstate Commerce Commission can appeal, and no certificate is necessary. If such decree refuses the injunction the complainant can not appeal. This is an apparent hardship to the complainant, but it is equally apparent that Congress so intended it. However that may be, such hardship is not sufficient to warrant us in construing the provision in regard to a certificate in case of division of opinion otherwise than as meaning that *a certificate is only proper and necessary where, through division of opinion, no decisive decree can be rendered.*

The constitutionality of the expediting act was upheld by the three circuit judges of the first circuit in *United States* v. *New York, New Haven & Hartford Railroad Co.* (165 Fed., 742).

Therefore, as it clearly appears that this court is without jurisdiction at this time to pass upon the merits of the case owing to the manner in which it has been brought before the court, it is respectfully submitted that the certificate should be dismissed and the case remanded to the Circuit Court with instructions to enter a decree in accordance with the opinion of the majority of that court.

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II

The Interstate Commerce Commission has authority to examine into and decide whether or not a railroad company is violating any of the provisions of the interstate-commerce act with respect to furnishing cars for transportation; to make an order requiring the carrier to cease and desist from such violation, and to prescribe what regulation or practice with respect to such transportation is just, fair, and reasonable.

Section 1 of the act to regulate commerce defines the term "transportation," and fixes the duty of the carrier, as follows:

> The term "transportation" shall include cars and other vehicles, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership, or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto.

Section 3 of the act provides:

> That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic in any respect whatsoever, or to subject any particular per-

> son, company, firm, corporation, or locality or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Section 12 of the act contains the following provision: "And the Commission is hereby authorized and required to execute and enforce the provisions of this act."

Section 13 provides that any person, etc., "complaining of anything done or omitted to be done by any common carrier subject to the provisions of this act, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts." Said section further provides that if the carrier fails to satisfy such complaint "it shall be the duty of the Commission to investigate the matters complained of, in such manner and by such means as it shall deem proper."

Section 14 provides "that whenever an investigation shall be made by said Commission it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises."

Eliminating the words not essential to this inquiry, section 15 of the amended act provides:

> That the Commission is authorized and empowered, and it shall be its duty, whenever, after full hearing upon the complaint made * * * it shall be of the opinion that any of the rates * * * demanded * * * by

> any common carrier * * * for the transportation of persons or property * * * *or that any regulation or practice whatsoever of such carrier, or carriers, affecting such rates,* are unjust or unreasonable, or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this act, to determine and prescribe what will be the just and reasonable rate * * * thereafter * * * to be charged; *and what regulation or practice in respect to such transportation is just, fair, and reasonable to be thereafter followed;* to make an order that the carrier shall cease and desist from such violation * * * and shall conform to the regulation or practice so prescribed.

The complainant contends that the order herein was made under the provisions of section 15, which gave the Commission no such power as was here exercised; that regulations and practices with respect to the distribution of coal cars among mines are not regulations and practices affecting rates; and complainant therefore denies the authority of the Commission to intervene between it and its coal shippers, with a view to controlling and reforming the manner in which the distribution is made.

Prior to the passage of the Hepburn Act (amendment of June 29, 1906) the Commission was required in any case in which it made an investigation, if it appeared that "anything has been done or omitted to be done in violation of the provisions of this act * * * to forthwith cause a copy of its report in respect thereto to be delivered to such common

carrier, together with a notice to such common carrier to cease and desist from such violation." The Interstate Commerce Commission had authority under the above provision, when it found that any section of the original act was being violated by a carrier, to order said carrier to cease and desist from such violation. It is now contended by the complainant that section 15, which is the section of the new statute which confers the rate-making power upon the Commission and provides specifically for rules and regulations to bring about the results intended to be secured by the Hepburn Act, withdraws from the Commission the power to make any order prescribing regulations or practices except those affecting rates.

It will be observed that the provisions of sections 12, 13, and 14 (above quoted) give the Interstate Commerce Commission power to investigate complaints with respect to violations of law by carriers and to make orders or requirements in the premises.

Each section of the act should be read in the light of every other section. The underlying purpose of the act to regulate commerce, and the acts amendatory thereof, is to put shippers on an absolute equality; to insure to them not only equal rights, but an impartial enjoyment of the facilities and services of interstate carriers.

The power of the Interstate Commerce Commission to deal with unjust, preferential, and discriminatory regulations and practices of carriers was clearly vested in the Commission under section 15 of the act as it stood prior to the amendatory act of June 29, 1906.

Whether or not it still exists under section 15 of the amended act must be ascertained by examining the whole act as it now stands with a view to gathering the general intent and purpose of Congress, and then by examining the various provisions by which the intent and purpose are sought to be made effective.

One of the chief purposes of the act to regulate commerce is to prevent the giving of any undue preference or advantage *in any respect whatsoever*. If it is possible, without doing violence to the language of the act, such a construction must be given to it as will remove the unlawful preference or prejudice. When the sections are read together, the conclusion must be reached that all the regulations and practices of carriers with respect to transportation which give any undue preference or unjust advantage to one shipper or locality over another come within the regulating power of the Commission. It is not necessary to write into section 15 any words essential to confer the jurisdiction here claimed. The general intent and spirit of the act, taken with the words themselves, show that the Commission has the power. As was said by Chief Justice Marshall in *The Durousseau* v. *United States* (6 Cranch, 307, 314):

> The spirit as well as the letter of a statute must be respected, and where the whole context of the law demonstrates a particular intent in the legislature to effect a certain object, some degree of implication may be called in to aid that intent.

We do not mean to be understood as indicating that the power of the Commission rests upon implication, but we do contend that "When different constructions of the act are possible the construction will be adopted which will promote and facilitate commerce rather than one which will hamper and destroy it." (*Texas Pacific R. R. Co.* v. *Interstate Commerce Commission*, 162 U. S., 197.) This court has held that the act should be interpreted reasonably to accomplish its great purpose, to wit, to secure just and reasonable charges, to prohibit unjust discriminations, and to prevent undue or unreasonable preferences. (*N. Y., N. H. & H. R. R. Co.* v. *Interstate Commerce Commission*, 200 U. S., 361.)

When the application for a preliminary injunction was refused in this case by the Circuit Court, that court unanimously held "that the Interstate Commerce Commission had authority under the provisions of section 15 of the interstate commerce act, as amended, to consider and dispose of the matters presented by the petition in said proceeding, and to examine into and decide whether or not any undue preference and unlawful discrimination forbidden by sections 2 and 3 of said interstate commerce act, or elsewhere in said act, had been practiced by said railroad company in its dealings with said Rail & River Company." (Record, p. 55.) It appears, therefore, that the Circuit Court, which certified this case to this court, and which was unable to unanimously agree upon a decree, had no difficulty in

reaching the conclusion that the Commission was authorized to hear the complaint and make an order with reference thereto.

In the case of *Chicago & Alton Railroad Company* v. *The Interstate Commerce Commission*, and *Illinois Central Railroad Company* v. *Interstate Commerce Commission*, decided together by the Circuit Court for the Northern District of Illinois, and involving the question of an order of the Commission with respect to the distribution of cars, the same question of the power of the Commission was necessarily before the court. The order of the Commission was upheld in part, and the fact that it was made with reference to this same practice of car distribution, and under section 15, met with no objection from the court so far as the question of authority was concerned.

The question of the jurisdiction of the Commission to hear the original complaint was raised at the outset of this controversy (*Rail & River Coal Co.* v. *B. & O. R. R. Co.*, 14 I. C. C. Report, 86) and was discussed at length by Mr. Commissioner Harlan, who upheld the power of that body to regulate the method of car distribution by interstate carriers. In construing section 15 the Commissioner said:

> * * * The language of that provision is entirely sufficient in itself to enable the Commission to redress wrongs of the character complained of in this proceeding. In reaching this conclusion we are not required to resort to ingenuity in construction or to rest the

> argument upon a mere matter of punctuation as suggested by counsel. In our view any practice or regulation that unlawfully discriminates against one shipper and affords an undue preference to another shipper is a regulation or practice affecting rates within the meaning of that phrase as used in the clause in question. Any regulation or practice that withdraws from a shipper the equal opportunity of using and taking advantage of the rates offered by a carrier to the public is clearly a regulation or practice affecting rates in the sense in which that phrase is used in the amended act at the point in question. To hold otherwise, as the defendant urges, would be to put the narrowest possible construction upon those words, in disregard of the general objects and purposes of the enactment. And this we are not warranted in doing under any recognized rule of statutory construction, and more especially when a remedial statute is under consideration. After having vested in the Commission the power to redress wrongs arising out of unreasonable and unjust rates, we are not ready to accept the view that the Congress has contented itself with a mere admonition in the law against the great wrongs that may be done against shippers through unjust regulations and practices. * * *

Similar jurisdiction had been exercised by the Commission in the case of *Railroad Commission of Ohio* v. *Hocking Valley Railroad Co.* (12 I. C. C. Report, 398, 404); *Royal Coal Co.* v. *Southern Ry. Co.* (13 I. C. C. Report, 440); *Traer, Receiver,* v. *C. & A. Ry. Co.*

(I. C. C. Report, 451). The construction given by the two Circuit Courts above quoted and the Commission is clearly proper.

Section 2 assures to shippers equality of rates, and section 3 equality of opportunity to use the rates and facilities of the carrier. An equality of rates without an equality of opportunity to use the facilities of the carrier would fall far short of the general objects sought to be accomplished by the act. The phrase "regulations and practices affecting rates" and the phrase "regulation or practice in respect to such transportation" should be given such a construction, if possible, as to permit the Commission to carry out the intent of Congress and to require carriers to cease and desist from violating the express provisions of sections 2 and 3 of the act. This construction can be given without doing violence to the language of the act. It is a well-settled rule of statutory construction that parts of an act will not be construed so as to defeat the purpose of other parts.

A system of car distribution which gives an unfair advantage to a shipper and subjects another shipper to an undue disadvantage is, after all, a regulation or practice affecting a rate. The shipper discriminated against does not have the equal opportunity for which he pays the same rate. The *price* paid for transportation may not be as important a factor as the opportunity to secure the facility. Many elements

enter into rate making, and price is only one of them. The shipper who pays the same *price* and is only able to secure half the number of cars necessary to transport his product pays a higher rate than the shipper who has all the cars he needs at the same price.

Commissioner Harlan, in deciding this case, said:

> The maximum or minimum weight of a carload is not something affecting the rate, but is, in fact, *a part of the rate*, a factor which is just as essential to a correct statement of the rate as is the rate per hundred pounds itself.

The phrase found in section 15 should not be construed to mean only those practices which in some way increase or diminish the amount of freight charges. Any regulation or practice which does not give a shipper absolute equality of service for the same rate, is a regulation or practice affecting rates, in the sense in which the language is used.

In a word, we submit that the Commission has power to make orders enforcing any and all the provisions of the interstate commerce act which require the furnishing of transportation at just and reasonable rates, which forbid unjust discrimination, or which make unlawful any practice or regulation by means of which undue preferences or advantages of any kind are effected by the carriers between shippers over their roads.

III.

The practice of the Baltimore and Ohio Company in this case, in failing to count "foreign railway fuel cars" and "private cars" against the distributive shares of the coal operators to whom said two classes of cars are assigned, is a violation of the interstate commerce act, gives to such operators an undue and unreasonable preference and advantage, and subjects to an undue and unreasonable prejudice and disadvantage other operators to whom such cars are not assigned.

The commission, after full hearing and investigation of the complaint, found that the practice of the railroad company was in violation of section 3 of the act to regulate commerce. Said section provides:

> That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage, in any respect whatsoever.

The answer of the Interstate Commerce Commission, filed herein, in part alleges:

> That said undue or unreasonable preference or advantage and undue or unreasonable prejudice or disadvantage necessarily result from the following undisputed facts:
>
> (*a*) The defendant, in rating mines for the purpose of establishing the percentage of available car equipment to which they are respectively entitled in the daily distribution

of cars during those periods when the demand for coal cars exceeds the supply, uses as a basis for such percentage distribution two factors: First, the physical capacity of the mine counted as 1, and, second, its commercial capacity counted as 2, and the latter is determined by the volume of shipments made by the mine during a certain period of each of the two years preceding the rating. The larger the number of cars assigned to a mine the greater will be the stimulus for development or increased production, as well as the greater the capacity of the mine for actual shipments. The method, therefore, of rating mines based on previous actual shipments as a predominating factor, taken in connection with the allotment to certain mines of foreign railway fuel cars and private cars, increases the rating of such mines and gives them larger percentages of cars in the general distribution during periods of car shortage not only than they would otherwise receive, but also than are received by other operators with mines of equal physical capacity to whom such cars are not assigned. The supply of equipment of such favored mines is thus increased both by the actual number of foreign railway fuel cars and private cars assigned to them, and also by the increased rating resulting from such assignment.

(*b*) The operator receiving the foreign railway fuel cars and private cars may develop or operate his mine to a fuller extent than can the operator of a mine of equal physical capacity who does not receive such cars.

(*c*) As between mines of equal physical capacities, the amount of their respective commercial outputs or shipments is limited by car supply. The greater the car supply the greater will be the output, and the greater the output the less the cost of production per ton. The operator, therefore, having the advantage in car supply can make greater profits on his coal or undersell his competitors.

(*d*) The fuller and more steady the supply of cars the greater is the number of days during a given period a mine can be run, and this cheapens the cost of production, because of the fixed charges which accrue whether the mine is operated or not, such as the pay of engineers, firemen, foremen, and superintendents, who are employed and paid by the month (whether they work the entire month or not), the feed of mules and horses, the cost of ventilation and pumping of mine, and other expenses.

(*e*) The contracts for coal between the mine operators and the complainant are, as a rule, offered to operators at prices named or fixed by the railroad company, and such operators, by reason of the cars furnished them in addition to their full quota on general distribution, are enabled to produce and sell such coal cheaper than they otherwise could, and, in fact, sell coal to the railroad company at a price lower than the prevailing price upon commercial coal, and the railroad company thus derives a profit to itself from its undue preference of such favored mine operators and the undue prejudice to which it subjects other operators not so favored.

(*f*) Giving to certain mines "foreign railway fuel" cars and "private" cars in addition to their full quota of cars on general distribution when such additional cars are not given to other mines enables the former to run more nearly to their full capacity than can the latter and to give steadier employment, and thus secure a better class and fuller supply of operatives.

(*g*) The operators of mines receiving "foreign railway fuel" cars and "private" cars are thereby enabled to make contracts for the delivery of coal distributed over long periods to a greater extent than can the mine operators not so favored or preferred.

(*h*) The said "foreign railway fuel" cars and "private" cars occupy the tracks and sideways of the complainant, are drawn by its locomotives, operated by its employees, and must lessen the facilities in those respects of mine operators to whom they are not assigned, and should, therefore, be counted or taken into account in determining the pro rata share in the general coal car distribution of the operators to whom they are assigned. (Par. 7 of the Answer of the Interstate Commerce Commission, pp. 30, 31, Transcript of Record.)

In other words, the Commission found that the practice of the carrier gives the following advantages to operators receiving foreign railway cars and private cars:

1. Larger percentage of cars.
2. Greater capacity of the mine for shipments.

3. Decreased cost of production.

4. Greater profits and advantages in competition.

5. Better class and fuller supply of operatives.

6. Advantages in the making of contracts distributed over a long period of time.

7. As the favored mines'. facilities are increased the disfavored mines' facilities are decreased in proportion.

After determining from the evidence that the above advantages resulted from the railroad's plan of car distribution, the Commission held that such advantages given to such operators, as aforesaid, constituted a violation of section 3 of the act, and the carrier was ordered to cease and desist from permitting such practice in the future.

It will be observed that the carrier has the power under its plan of distribution to dictate coal contracts with every mine owner so favored, in consideration of the preferences and advantages given to him. In other words, the disfavored mine owner can be crippled and put out of business by the failure of the carrier to count foreign railway fuel cars and private cars in the assignments made by it.

The complainant has failed to show that the Interstate Commerce Commission erred in its findings of fact, and it seems therefore to be undisputed that the favored operators can run their mines more nearly continuously than can the less favored operators; that the favored operators can keep together the

organization of their mines, and the fixed charges remain practically the same; that the product can be marketed both at a less price or a greater profit than it can by those discriminated against; that the favored operators are enabled to increase their output and therefore their capacity rating, and thereby secure a greater proportion of system cars. All these advantages were found to result from the plan of car distribution enforced by the railroad company, and the Commission then found that such advantages and discriminations were undue and unreasonable and violative of section 3 of the act.

The courts also in several cases have examined this subject of car distribution among coal mines and upon a similar state of facts have reached the same conclusion as the Commission. The following cases expressly hold that when carriers pursue a method of car distribution which fails to take into account "private" and "foreign railway fuel" cars they violate the interstate commerce act.

In *United States ex rel. Kingwood Coal Co.* v. *West Virginia Railroad Co. et al.* (125 Fed. Rep., 252) the court held that the distribution of cars by a railroad between coal-mining companies on its line of road was made upon a basis which gave an undue preference to certain companies and operated as an undue prejudice or disadvantage to the relator company in violation of section 3 of the interstate commerce law. The case was affirmed by the Circuit

Court of Appeals (134 Fed. Rep., 198). In that case it was contended—

> That the court had no power in a proceeding of this character to fix the percentage of cars the relator should have and to command that such percentage of cars should be furnished to the relator.

In answer to that contention, the court said:

> The acts of Congress forbade discrimination, and made it unlawful to give any undue or unreasonable preference or advantage to particular persons, companies, corporations, or localities, or any particular description of traffic, or to subject them to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, and vested jurisdiction in the circuit and district courts to proceed by mandamus as a cumulative remedy for violation of the statutory provisions. (134 Fed. Rep., 198, 204.)

In *United States ex rel. Greenbrier Coal and Coke Co.* v. *Norfolk & Western Railroad Co.* (143 Fed. Rep., 266), the Circuit Court of Appeals again held that the method of distribution of cars was within the provisions of the interstate commerce act. To the same effect is *Logan Coal Co.* v. *Pa. R. R. Co.* (154 Fed. Rep., 497). See also *United States ex rel. Pitcairn Coal Co.* v. *B. & O. R. R. Co.* (165 Fed. Rep., 113), and *Majestic Coal and Coke Co.* v. *Ill. Central Railroad Co.* (162 Fed. Rep., 810).

The language of Judge Pritchard in *U. S. ex rel. Pitcairn Coal Co.* v. *B. & O. R. R. Co.* (165 Fed Rep., 126) is important in this connection. He said:

> The court below, in dealing with the question relative to the fuel cars of the Baltimore & Ohio Railroad Company and foreign railroad cars, held that they were not to be charged against the companies using them as a part of the percentage to which they were entitled under the arrangement agreed upon to which reference has heretofore been made. A careful consideration of this phase of the question forces us to the conclusion that the fuel cars of the carrier, its regular equipment of cars, the cars of other roads sent in for fuel, and the private or individual cars of the mining operators should be placed absolutely upon the same basis so far as the distribution of car service by the carrier is concerned. We fail to understand upon what theory the carrier can relieve itself from a charge of discrimination, when it is shown that such cars are arbitrarily allotted to certain mines, and not charged to such mines as a part of the percentage to which they are entitled under the arrangement by which it is undertaken to secure a fair distribution car service among the shippers on its line.

The language of Judge Holland in the case of *Logan Coal Company* v. *Pennsylvania R. R. Co.* (154 Fed. Rep., 497), seems to be directly in point. He said:

> What has been said in regard to individual cars applies to the use of fuel cars, whether

> they be those of the defendant company or fuel cars of other corporations purchasing coal from the relator. They should be treated the same as individual cars in the distribution of available cars, and the defendant company in its treatment of these cars by the order of January 1, 1906, in no way that we can see unduly or unreasonably discriminated against the relator. This precise question has not heretofore been considered, but the question of car distribution to shippers, including individual and fuel cars, has been before the courts in a number of cases, and the general trend of the decisions is to the effect that all cars, whether individual cars or owned by the railroad company, or assigned by other railroad companies for fuel, shall be treated as an available car equipment as a whole, distributable pro rata to shippers desiring their use along the line, upon a basis giving each equal facilities with the other.

In the above case the railroad company had made a rule by which such cars *were counted*. Since it was held that such a rule did not discriminate against the contract mine to which they were furnished, it must follow that the converse of the rule would be a discrimination. In *Majestic Coal and Coke Co.* v. *Illinois Central R. R. Co.* (162 Fed. Rep., 810) it was held that a railroad company had no legal right to leave out of consideration private or foreign cars in making the allotments for car distribution.

In *Chicago & Alton R. R. Co.* v. *Interstate Commerce Commission*, decided with the case of the *Illinois Central R. R. Co.* v. *Interstate Commerce Com-*

mission on June 29, 1908 (not reported, but found in the record, case No. 232, Supreme Court of the United States, being the *Interstate Commerce Commission, appellant,* v. *The Chicago & Alton R. R. Co.*), Judge Baker, of the Circuit Court of the United States for the Northern District of Illinois, discussed this question as follows:

> I. The so-called private cars.
>
> A charter duty of railroads is to provide cars as well as tracks and locomotives. So far as the shipping public is concerned, it is a matter of indifference whether railroads discharge this duty by purchasing or renting or borrowing cars. But since no vehicle for transporting commodities in commerce can have any rights upon the tracks of a public carrier except under and by virtue of the carrier's charter, a shipper who is not also a lessor or lender of cars is interested in seeing that the carrier abstains from discriminations in conditions of service on account of the ultimate ownership of any of the instrumentalities used by it in the transportation of commodities in commerce. A shipper who owns cars is not entitled on that account, or on any account, to a preference in rates or in promptness of service. If his cars are used, all that he is entitled to is to be paid the just value of the use, whether measured by mileage or otherwise. If he has a contract with the carrier that calls for more, that contract is pro tanto void. In our judgment, therefore, the so-called private cars, if accepted by an interstate carrier for use by it in transporting

a commodity in commerce, must be treated as constituting a part of the carrier's available commercial equipment.

It appears that certain shippers who own cars do no business outside of Illinois. In their behalf it is suggested that, even if private cars used in interstate commerce must be counted, the complainant carriers can not be required to take into consideration the cars of shippers who do only an intrastate business.

Where federal authority exists, it is paramount. It exists here by virtue of the fact that the complainants are interstate carriers. No practices on their lines can be permitted which favor local commerce at the expense of interstate and foreign commerce. In case of a conflict with a rule for the protection of interstate commerce, which has been duly made by the Interstate Commerce Commission, local constitutions, statutes, orders of railway commissions, and regulations of the carriers all must give way.

II. Fuel cars of foreign railroads.

The fact that these railroads are themselves common carriers has nothing to do with the case. Here they stand as mere consignees of a commodity that is transported in commerce by an interstate common carrier which is forbidden to prefer them in any way above other consignees or shippers. In so far as complainants receive upon their roads the fuel cars of foreign railroads they must count them as part of their own available commercial equipment.

While in that case Judge Baker did not require the counting of the cars used by a carrier for its own fuel as a part of the equipment of the road, yet the reasons he gave for including foreign fuel cars and private cars as a part of the available equipment, seem to us to concisely state the propositions for which we contend.

Private cars and foreign railway fuel cars lessen the available motive power and track facilities by the percentage which such cars bear to the total number of cars hauled or to be hauled by such motive power over the tracks of the complainant. Foreign railway fuel cars and private cars, being consigned directly to certain operators, are of necessity delivered to such operators. The mine operator who receives his cars from the available commercial equipment of the Baltimore & Ohio Railroad Company suffers because he is deprived of the use of such motive power and track facilities until his competitors receive their special cars. For purposes of illustration let us take three mines located upon the lines of the Baltimore & Ohio Railroad Company, each of which has a rated capacity of 50 carloads daily.

Mine No. 1 has a contract for 25 cars daily from the Southern Railway. Mine No. 2 owns 25 cars in its own right, and in this equipment it furnishes 25 carloads of coal to the city of Baltimore. Mine No. 3 has no contract with any railroad company, receives no specially consigned foreign railway cars, and has

no private cars of its own, but has a contract to deliver 25 carloads of coal daily to the city of Philadelphia. Each of these mines has a contract for future delivery that is as good as that enjoyed by either of its competitors. In times of car shortage, when there is, we will say for purposes of illustration, 50 per cent car supply, the respective mines will receive, under the contention of the complainant in this case, as follows: Mine No. 1 will receive its 25 Southern Railway cars and 50 per cent of its rated capacity from the company cars available for general distribution, or 25 cars, an aggregate of 50 cars; Mine No. 2 will receive daily its own 25 cars and 50 per cent of its rated capacity, or 25 cars, an aggregate of 50 cars; while Mine No. 3 will receive only 50 per cent of its rated capacity, or 25 cars in the aggregate. Under such a situation mines No. 1 and No. 2 may operate to their full capacity, perform their contracts at the contract price, and have 25 carloads daily each to sell in the commercial market. But Mine No. 3 is able only to fill its contract with the city of Philadelphia and is unable to market any commercial coal, and besides can only operate during half the time. In times of car shortage the price of coal advances, we will say, 50 cents per ton, over the contract price to the Southern Railway, the city of Baltimore, and the city of Philadelphia. Mines No. 1 and No. 2 are thus able to market daily 25 carloads of, say, 40 tons each, or 1,000 tons of coal from each mine. This enables them to earn a commercial profit of $500 each day during the car shortage. But no such profit is enjoyed by

Mine No. 3. On the contrary, it sees its best workmen unwilling to remain with an employer at half wages, going to mines No. 1 and No. 2, which, by reason of the full use of all the working places in each of their mines, can give full wages to capable workmen, and at the same time increase the number of working places in said mines so that when the next rating time comes around the mine will be able to market an increased amount of coal. If the available car supply in the example just given falls below 50 per cent, Mine No. 3 will not be able to keep its contract with the city of Philadelphia.

On the contrary, if the order of the Commission be sustained and complied with, these three mines would receive an equal number of cars; each mine would have the equal use of the tracks and locomotives of the complainant. In short, each mine receives equal treatment and is offered an equal opportunity to use the transportation facilities of the Baltimore & Ohio Railroad. Adding to the 75 cars available of the Baltimore & Ohio Railroad Company's equipment the 25 cars consigned from the Southern Railway and the 25 private cars of Mine No. 2, there would be 125 cars available for distribution to the three mines. This would give to each mine about 42 cars. Mine No. 1 will receive its 25 Southern Railway cars and 17 in addition. Mine No. 2 will receive its own 25 cars and 17 in addition. Mine No. 3 will receive 42 cars, its full distributive share. The shortage in equipment is borne alike, 8 cars to each mine. Each mine is able to meet its daily contract and participate equally in

the commercial market. There is no reason for the workmen in one mine to leave it and go to another, because all the mines are able to operate an equal number of hours daily. So far as transportation facilities are concerned and the effect upon mining, the cost of producing a single ton of coal is the same at each mine, and each operator is placed upon the same footing as his competitor.

It therefore appears that under the order of the Commission the system of coal car distribution upon the Baltimore & Ohio Railroad would be equitable, fair, and just to all concerned. No undue advantage is given to either Mine No. 1 or Mine No. 2 and no undue prejudice is suffered by Mine No. 3.

It is the carrier's duty, under section 1 of the act, to furnish transportation upon reasonable request. It is not the duty of the shipper, but of the railroad, to provide the required vehicles of transportation. It is the carrier's duty to equip its road with the means of transportation open impartially to all shippers. This court has frequently laid down the doctrine that it is the absolute duty of the carrier to equip its road with instrumentalities of carriage for the traffic it undertakes to carry; that a railroad company is charged with the absolute duty of furnishing facilities alike to all who apply for them; that this duty can not be transferred or contracted away, and that all shippers must indifferently and upon equal terms share the burden in times of car shortage. As was said by Mr. Justice Brewer in *Missouri*

Pacific Railway Co. v. *Larabee Mills* (211 U. S., 612, 619):

> This lies at the foundation of the law of common carriers. Whenever one engages in that business the obligation of equal service to all arises, and that obligation, irrespective of legislative action or special mandate, can be enforced by the courts.

See also *St. Paul, Minneapolis and Manitoba Railway Co.* v. *Wenzel* (139 U. S., 23); *Railroad Company* v. *Interstate Commerce Commission* (200 U. S., 361).

In the case at bar, it is not necessary to go further than to say that in times of car shortage on any railroad doing an interstate business, all cars privately owned, or leased, or specially consigned under any arrangement which distinguishes them from the so-called "system" cars belonging to the railroad, must be counted in determining what share in the general facilities of the road shall be allotted to the shipper having the exclusive use of such privately owned or specially consigned cars. But we submit that the rule of law is, and ought to be, that at all times all cars built, owned, leased, or otherwise controlled by anybody, which go upon the tracks of a railroad company, become a part of its equipment, available for the use of all its shippers alike. We submit further that, while it may not be an undue discrimination under the terms of the interstate commerce act for a railroad company, in times of sufficient car supply, to permit the owners or lessees of private cars to

have the exclusive use of them; yet, in times of car shortage, even such exclusive use may become an undue discrimination. These propositions are fully sustained in several well-reasoned cases which go to the bottom of controversies before the courts and the Commission respecting the distribution of coal cars. In the case of *United States* v. *Railway Co.* (109 Fed., 831–837) Judge Jackson quoted with approval the following language of Judge Cooley in *Rice* v. *R. R. Co.*, 1 I. C. C., 503:

> It is properly the business of railroad companies to supply to their customers suitable vehicles of transportation (*Railway Co.* v. *Pratt*, 22 Wall., 123–133) and then to offer their use to everybody impartially. If the varieties of traffic are such, and their requirements of rolling stock so numerous and diversified that this becomes impracticable or burdensome, so that the aid of their customers becomes essential or convenient, the supply obtained by their assistance can not, with any justice, be utilized by the carrier in such manner as to establish discriminations which would otherwise be inadmissible. The carrier has no right to hire rolling stock and then allow it to be used exclusively by one class of persons in such terms as will drive out of business those who are compelled to use its own rolling stock in a competitive traffic.

In *State ex rel.* v. *Railway Co.* (47 O. S., 130; 23 N. E. Rep., 928) the Supreme Court of Ohio had before it a question involving the duty of a railway company to provide equal facilities to shippers of oil, not-

withstanding the fact that one of such shippers owned private tank cars. In that case the court said:

> It may be claimed that if a railroad company permit all shippers indifferently and upon equal terms to provide cars suitable for their business and to use them exclusively, no discrimination is made. This may be theoretically true, but it is not so in its application to the actual state of the business of the country; for a very large proportion of the customers of a railroad have not a volume of business large enough to warrant equipping themselves with cars, and might be put at a ruinous disadvantage in the attempt to compete with more extensive establishments. Aside from this, however, a shipper is not bound to provide a car; the duty of providing suitable facilities for its customers rests upon the railroad company, and if, instead of providing sufficient and suitable cars itself, this is done by certain of its customers, even for their own convenience, yet the cars thus provided are to be regarded as part of the equipment of the road. It being the duty of a railroad company to transport freight for all persons indifferently and in the order in which its transportation is applied for, it can not be permitted to suffer freight cars to be placed upon its track by any customer for his private use, except upon the condition that, if it does not provide other cars sufficient to transport the freight of other customers in the order that application is made, they may be used for that purpose. Were this not so, a mode of discrimination fatal to all successful competition by small

> establishments and operators with large and more opulent ones could be successfully adopted and practiced at the will of the railroad company and the favored shipper.

In a word, the duty to treat all shippers alike can not be avoided by any device or pretext whatsoever. No other rule is safe. If a carrier may lawfully accept a contribution of freight cars from one of its customers, upon condition that such cars shall always, even in times of car shortage, be available only for the use of the one customer, then the carrier may completely surrender the control of its road and may completely avoid its obligation to carry for the public. If the railroad may contract for the special and exclusive use of cars furnished by one of its shippers, it may lease any or all of its equipment to favored shippers, and then it will cease to be a common carrier. As a railroad can not disable itself to perform the public functions for which it was created by any sale, lease, or mortgage of its property (*Thomas* v. *Railroad Co.*, 101 U. S., 71; *Oregon Railway & Navigation Co.* v. *Railway Co.*, 130 U. S., 1), so it can not make any special or exclusive disposition of its cars or bind itself by contract to regard the cars of others as subject to a special or exclusive use. To say that a railroad company may do this, is to permit it to maintain a roadbed, tracks, and motive power for the purpose of furnishing transportation to those only who own cars. In any event, however, we submit that in a time of car shortage, private or specially consigned cars, even though exclusively

used by the shipper owning or controlling them, must be counted as a part of the share of such shippers in the general equipment available for all shippers.

This court will take judicial notice of a resolution of Congress and reports made pursuant thereto. While it is not disclosed by the record, yet by way of argument we desire to call attention to the resolution of Congress passed March 7, 1906, directing the Interstate Commerce Commission specifically to investigate and report as to the system of car supply and distribution in effect upon the railway lines engaged in interstate transportation of coal, and whether such carriers, in the matter of distribution of cars, discriminated against shippers or gave any undue preference or advantage.

On January 25, 1907, the Commission made its report under the above resolution. In speaking of the practice of the carriers with reference to the distribution of its cars, the Commission, on page 68 of that report, used the following language:

> The prevailing rule is that cars in which coal was loaded were not counted against the percentage of cars allotted to the operator furnishing such coal, but that fuel-coal cars were arbitrarily allotted to the operators furnishing such coal over and above their percentage allotment.
>
> The reason advanced by the officers of the railroad for this was that it enabled them to get cheaper fuel, in that an operator loading fuel coal would get the cars necessary to carry

the same over and above the percentage he was entitled to under the system of car distribution in effect, and that he would therefore be willing to make a low price on fuel coal in order to keep his colliery running regularly. The result of this was practically a payment by the operator to the railroad company for cars by way of reducing the price of fuel coal, and while the profit of the operator on fuel coal may not be large, it enabled him to keep his miners regularly employed and his plant in operation, and gave him an advantage over a competitor who has no order for fuel coal.

This system for allotting cars for fuel coal and not charging the same as against the percentage of the operator receiving the same is unjust and unfair unless fuel coal is taken from all of the mines on the line of the road in the same proportion that cars are distributed.

And again on page 80:

In the opinion of the Commission the use of "individual cars" is a source of discrimination, inequality, and unfairness in the service rendered to the shippers by the carriers, and steps should be taken at the earliest possible moment to abolish their use in the coal service.

Another source of discrimination in the system of car distribution on the several railroads is the assignment of cars to certain operators for fuel coal or company coal without charging such cars against the pro rata distributive shares in the equipment of the road. In other words, treating such assigned cars as arbitrary cars and also treating cars

> from other roads for fuel coal as arbitrary cars and not counting them against the percentage to which the operator receiving them is entitled. This method of distributing cars interferes with, and to a certain extent nullifies, any fair system of distribution which may be put into effect, creates inequalities and injustice as between shippers, and is frequently used by the railroad company to enable it to get its fuel supply at less than the market price for coal, and amounts to an arbitrary assignment of cars in consideration of the difference between the price the company has to pay for fuel coal and the market price thereof.

The above report was made after a careful and thorough examination of this whole subject-matter. While the above finding is not binding upon this court, yet in view of the fact that Congress made this Commission an expert tribunal and gave it full power under the above resolution to investigate this whole subject, we feel that an opinion rendered by it after thorough investigation is entitled to very great weight in the determination of this controversy. Since the record shows that the favored mine owners are given advantages by a system of car distribution contended for by the railroad, we do not believe the finding of the Commission that that advantage constitutes an undue preference will be disturbed by this court.

IV.

The evidence introduced before the Circuit Court does not tend to show that the Interstate Commerce Commission acted fraudulently or failed to comply with the terms of the statute as to its procedure, or that the order confiscates property. The testimony herein is inadmissible, since the court will not restrain the enforcement of an order properly made unless the same is shown to invade some constitutional right.

The competency and power of the Interstate Commerce Commission to decide upon and make orders regulating the practices of railroad companies have been established by numerous decisions holding that the Commission is an expert tribunal created by Congress to enforce the provisions of the interstate commerce act; and since the act itself does not define what constitutes an undue preference or advantage, it is primarily the function of the Commission to ascertain what practices constitute a violation of the act, and to make an order correcting the same. This court will not substitute its judgment for that of the Commission, nor will it restrain the enforcement of an order of the Commission, unless the facts appearing affirmatively show that the order was not within the limits of its powers, was irregularly made, or was so arbitrary as to invade some constitutional right.

In *Interstate Commerce Commission* v. *Louisville & Nashville Railway Company* (118 Fed. Rep., 613–626) the court said:

> The righteous orders of the great commission it has primarily intrusted with the tremendous duty should in all proper cases be re-

> spected and enforced by the courts of the country. The organic law upon which this power in Congress and in the courts is founded is the sure guaranty to investors in transportation lines against the assaults whether of the agrarian or the demagogue, the anarchist or the mob. While, on occasion, the railway company or other corporation may suffer a temporary diminution of revenues from an order of this character, the interest of the public, and in the end of the corporation itself, is conserved. In all cases the general welfare must control.

Judge Taft, in writing the opinion of the Circuit Court of Appeals in the case of *East Tennessee, Virginia & Georgia Railway Company* v. *Interstate Commerce Commission* (99 Fed. Rep., 52–64), said:

> It has been suggested that traffic managers are much better able, by reason of their knowledge and experience, to fix rates and decide what discriminations are justified by the circumstances than courts. This can not be conceded so far as it relates to the Interstate Commerce Commission, which, by reason of the experience of its members in this kind of controversy and their great opportunity for full information, is, in a sense, an expert tribunal.

Speaking of the Interstate Commerce Commission, this court, in *Interstate Commerce Commission* v. *Railway Company* (167 U. S., 479–506), said:

> It is charged with the general duty of inquiring as to the management of the business

> of railroad companies, and to keep itself informed as to the manner in which the same is conducted, and has the right to compel complete and full information as to the manner in which such carriers are transacting their business. And with this knowledge it is charged with the duty of seeing that there is no violation of the long and short haul clause; that there is no discrimination between individual shippers; and that nothing is done by rebate or any other device to give preference to one as against another; and that no undue preferences are given to one place or places or individual or class of individuals, but that in all things that equality of right, which is the great purpose of the interstate-commerce act, shall be secured to all shippers.

In *Tift* v. *Southern Railway Company* (138 Fed. Rep., 753–760) the court said:

> It can, we think, be no longer open to question that the Interstate Commerce Commission is the expert tribunal empowered by law to determine in the first instance the reasonable or unreasonable character of the rate charged for transportation in interstate commerce.

Mr. Justice White, in *Railway Co.* v. *Abilene Cotton Oil Co.* (204 U. S., 426–439), used the following language:

> When the general scope of the act is enlightened by the considerations just stated, it becomes manifest that there is not only a relation but an indissoluble unity between the provision for the establishment and maintenance of rates until corrected in accordance

> with the statute and the prohibitions against preferences and discrimination. This follows, because unless the requirement of a uniform standard of rates be complied with it would result that violations of the statute as to preferences and discrimination would inevitably follow. This is clearly so, for if it be that the standard of rates fixed in the mode provided by the statute could be treated on the complaint of the shipper by a court and jury as unreasonable, without reference to prior action by the Commission, finding the established rate to be unreasonable, and ordering the carrier to desist in the future from violating the act, it would come to pass that a shipper might obtain relief upon the basis that the established rate was unreasonable, in the opinion of a court and jury, and thus such shipper would receive a preference or discrimination not enjoyed by those against whom the schedule of rates was continued to be enforced.

He who asserts that an order of the Commission should be suspended or set aside bears the burden of proof to sustain his contentions. In this case the answer of the Interstate Commerce Commission discloses a finding of facts by that tribunal which has not been disproved by the complainant here, and no showing has been made that any right of the plaintiff has been violated. We submit that the evidence introduced before the circuit court does not show that the regulation prescribed by the Commission interferes with any constitutional right of the carrier, and therefore is without force or weight.

No testimony is admissible in a case such as the one at bar unless it tends to show whether or not the Commission has acted fraudulently or failed to comply with the terms of the statute as to its procedure in making the order or that the order confiscates the property of the complainant. The depositions and exhibits introduced before the Circuit Court do not tend to show any arbitrary action by the Commission, nor do they tend to show that the property of the complainant is being taken without due process of law. Mr. Hale's testimony was taken before the Commission (Rec., p. 59). There is no showing whatever made by the complainant in this case that warrants the introduction of this deposition, and it should have been excluded by the Circuit Court. Nowhere does the testimony tend to show that the Commission has failed to comply with the provisions of the statute in its procedure or that it has acted so arbitrarily or unreasonably as to transcend the limits of legitimate regulation. This court is not an appellate Interstate Commerce Commission. The act does not contemplate that a case should be first heard by the Commission and that the carriers may then have the case heard *de novo* by the court. Congress never intended that the Commission's work should be done anew by the courts of the United States whenever the carriers interested saw fit to request such action. The only province of the court is, upon proper pleadings and proof, to set aside orders of the Commission which clearly appear to invade constitutional rights. The so-called review

amendment in the act of June 29, 1906, merely fixes the venue of such cases and expressly authorizes suits against the Commission as a representative of the Government.

In this case the plan of car distribution maintained by the railroads is clearly unlawful; it violates the provisions of section 3 of the interstate-commerce act, forbidding undue or unreasonable preferences and advantages, and even without any finding of the Interstate Commerce Commission, this court taking the pleading of the railroad company, in which its practice is admitted, will refuse to approve that practice or to grant any equitable relief which will permit the railroad company to continue to violate the law. But the Interstate Commerce Commission *has* made a finding that the practice complained of is an undue and unreasonable preference and advantage as condemned by section 3. It has made an order prescribing what practice in the future with respect to the distribution of cars will be just and reasonable in conformity with the act, and the railroad company has neither plead nor proven that the order of the Commission will deprive it of any constitutional right. We therefore submit that the order must stand.

WADE H. ELLIS,
Assistant to the Attorney-General.
LUTHER M. WALTER,
ORLA E. HARRISON,
Special Assistants to the Attorney-General.

O

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1908.

IN EQUITY.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
COMPLAINANT BELOW.

vs.

THE INTERSTATE COMMERCE COMMISSION,
DEFENDANT BELOW.

DOCKET No. 695.

MOTION.

Now comes The Baltimore and Ohio Railroad Company, Complainant below, and moves the Court to advance this cause and to set it down for an early hearing.

In support of such motion it respectfully shows:

1. That this cause was brought in the Circuit Court of the United States for the District of Maryland to enjoin, set aside, annul, and suspend an order of the Interstate Commerce Commission, in accordance with the provisions of Section 16 of the Act to Regulate Commerce, approved February 4th,

1887, as amended June 29th, 1906. That it is provided in said Section 16 as follows:

> "The provisions of 'An Act to expedite the hearing and determination of suits in equity, and so forth,' approved February eleventh, nineteen hundred and three, shall be, and are hereby, made applicable to all such suits, including the hearing on an application for a preliminary injunction, and are also made applicable to any proceeding in equity to enforce any order or requirement of the Commission, or any of the provisions of the Act to regulate commerce approved February fourth, eighteen hundred and eighty-seven, and all Acts amendatory thereof or supplemental thereto. It shall be the duty of the Attorney-General in every such case to file the certificate provided for in said expediting Act of February eleventh, nineteen hundred and three, as necessary to the application of the provisions thereof, and upon appeal as therein authorized to the Supreme Court of the United States, the case shall have in such court priority in hearing and determination over all other causes except criminal causes."

2. That pursuant to the provisions of said Section 16 above set forth and of the expediting Act therein referred to, the Attorney-General of the United States filed in said Circuit Court of the United States for the District of Maryland a certificate that in his opinion the said case was of general public importance.

3. That thereupon, there being not more than two circuit judges in the circuit in which this cause was pending (viz.: the Fourth Circuit), the said cause was assigned for hearing before said two circuit judges and before a district judge

selected by them in accordance with the provisions of the said expediting Act. That on December 14th, 1908, this cause was finally heard before said judges on the pleadings and on the deposition of one witness submitted on behalf of the appellant; that no two of said three judges were agreed as to what decree should be rendered in the said cause, and that, therefore, finding themselves divided in opinion, they ordered that this cause be certified for review to this Court in accordance with the provisions of the expediting Act aforesaid; that the record of this cause was duly filed with the Clerk of this Court by the Complainant below on January 25th, 1909, and that the said record has now been printed.

4. That the order of the Interstate Commerce Commission hereinbefore referred to prescribes the method in which the Complainant below shall distribute empty coal cars for loading among the bituminous coal mines situated on its lines, and regulates the distribution by the Complainant below not only of cars owned by it or operated by it as its own, but also of cars belonging to the owners of such mines and of cars consigned to such mines by other railroads for the purpose of receiving and transporting fuel coal purchased by them from such mines. That this cause involves some of the same questions of law which are involved in the case of the Interstate Commerce Commission *v.* Chicago and Alton R. R. Co., Docket No. 501, and in the case of the Interstate Commerce Commission *v.* Illinois Central R. R. Co., Docket No. 502, now pending in this Court, and particularly the question as to the power of the Interstate Commerce Commission to make such orders under Section 15 of the Act to Regulate Commerce, approved February 4th, 1887, as amended June 29th, 1906:

that the said cases, Nos. 501 and 502, have been set down for hearing by this Court on March 1st, 1909; that the Complainant below respectfully requests that this cause be heard as soon after the said cases Nos. 501 and 502 as the convenience of this Court will permit, in order that the said cause may be heard prior to the decision by this Court of said cases Nos. 501 and 502, and to that end respectfully suggests that this cause be heard on March 15th next.

5. That according to the custom of the bituminous coal trade the year for which contracts for the sale of bituminous coal are made with the mines on the lines of the Complainant below is the year from April 1st to April 1st; that, therefore, the early determination of this cause is of great importance not only to the Complainant below but to the operators of such mines and to the general public.

Respectfully submitted.

(Sd.) Hugh L. Bond, Jr

Solicitor for
The Baltimore and Ohio Railroad Company.

FEB 25 1908
JAMES H. MCKENNEY,
Clerk

No. 380.

In the Supreme Court of the United States.

OCTOBER TERM, 1908.

BALTIMORE & OHIO RAILROAD COMPANY,
COMPLAINANT BELOW,

v.

INTERSTATE COMMERCE COMMISSION,
DEFENDANT BELOW.

MEMORANDUM OF SUGGESTIONS BY THE UNITED STATES ON MOTION TO ADVANCE.

73984—09

In the Supreme Court of the United States.

OCTOBER TERM, 1908.

BALTIMORE & OHIO RAILROAD CO. v. INTERSTATE COMMERCE COMMISSION. } No. 695.

MEMORANDUM ON THE MOTION OF THE *BALTIMORE & OHIO RAILROAD COMPANY, COMPLAINANT BELOW*, v. *THE INTERSTATE COMMERCE COMMISSION, DEFENDANT BELOW* (DOCKET No. 695), TO ADVANCE SAID CAUSE AND TO SET IT DOWN FOR EARLY HEARING.

Upon this motion the Government makes the following suggestions:

First. Cases Nos. 501 and 502, being respectively *The Interstate Commerce Commission, appellant*, v. *Chicago & Alton Railway Company*, and *Interstate Commerce Commission, appellant*, v. *The Illinois Central Railroad Company, appellee*, are already assigned for oral argument on Monday, March 1, after the case heretofore assigned for that day. These cases involve substantially the same questions as those which are involved in case No. 695. Therefore, if case No. 695 is to be advanced and heard on March 15, 1909, cases Nos. 501 and 502

may appropriately be reassigned and set for the same date.

Second. Cause No. 611, entitled *Baltimore & Ohio Railroad Company et al., Appellant*, v. *United States ex rel. Pitcairn Coal Company, Appellee*, has not been advanced on the docket, but also involves substantially the same questions as those involved in cases Nos. 501, 502, and 695. Therefore, case No. 611 might appropriately be heard on March 15 if the other cases referred to are set down for argument on that date. Counsel in the last-named case have advised the Government that they desire their case heard with the others here referred to.

Third. All these causes involve the question of the duty of railroad companies in the distribution of coal cars to the mines along their lines. The three cases against the Interstate Commerce Commission are suits to restrain the enforcement of orders heretofore made by the Commission with respect to such distribution of coal cars. The Pitcairn case is an action in mandamus by the coal company to require the railroad company to perform its duty with respect to the distribution of such cars. In the Interstate Commerce Commission cases the railroads deny the jurisdiction of the Commission to make the orders, as well as the reasonableness of the orders made. In the Pitcairn case the railroad company denies the jurisdiction of the court to grant the relief sought, as well as the reasonableness thereof. It follows, therefore, that the merits of the controversy as to the

proper distribution of coal cars are involved in all the cases, while separate jurisdictional questions are involved in each of the two classes of cases. For this reason, we suggest that all these cases should be heard at the same time, and if March 15 is not a convenient date they may very appropriately go over until the beginning of the next term.

Fourth. The several railroad companies, parties to this litigation, state that they desire a final adjudication of the questions before April 1, 1909, for the reason that their annual contracts begin on or about that date, and that the distribution of cars is an element affecting such contracts. As to this we respectfully suggest that the making of such contracts is in no way prejudiced by the pendency of litigation involving the proper distribution of cars. Such contracts may well be made subject to the lawfulness of the practices now prevailing with the railroad companies.

Respectfully submitted.

HENRY M. HOYT,
Solicitor-General.
WADE H. ELLIS,
Assistant to the Attorney-General.

O

BALTIMORE AND OHIO RAILROAD COMPANY *v.* INTERSTATE COMMERCE COMMISSION.

ON CERTIFICATE FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

No. 339. Argued October 15, 18, 1909.—Decided December 6, 1909.

Only distinct points of law that can be distinctly answered without regard to other issues can be certified to this court on division of opinion: the whole case cannot be certified even when its decision turns upon matter of law only.

Appellate jurisdiction implies the determination of the case by an inferior court, and the transfer of the case to the appellate court without such determination amounts to giving the appellate court original jurisdiction.

Congress cannot extend the original jurisdiction of this court beyond that prescribed by the Constitution; and an act providing for certifying questions of law will not be construed as permitting certification of the entire case before any judgment has been rendered below.

Under § 1 of the expediting act of February 11, 1903, c. 544, 32 Stat. 823, the case, although turning only on a point of law cannot be certified to this court, in absence of any judgment, opinion, decision, or order determinative of the case below.

THIS was a bill in equity filed by the Baltimore and Ohio Railroad Company in the Circuit Court of the United States for the District of Maryland against the Interstate Commerce Commission, July 20, 1908, which prayed for a preliminary injunction and a final decree enjoining, annulling and suspending a certain order of the commission served June 24, 1908, in a proceeding before the commission entitled "Rail and River Coal Company *vs.* Baltimore and Ohio Railroad Company."

On July 27, 1908, the Attorney-General, in compliance with § 16 of the act to regulate commerce, as amended by the act of June 29, 1906, filed in the court the certificate of general public importance under the expedition act of February 11, 1903. In accordance with the provisions of the act of February 11, 1903, the two Circuit Judges, by order filed August 26, 1908, designated the Honorable Thomas J. Morris, District Judge for the District of Maryland, to sit with them on the hearing and disposition of the case.

The application for the preliminary injunction was set for hearing September 22, 1908. Defendant's answer was filed September 19, 1908. By order entered September 23, 1908, the application for the preliminary injunction was denied.

Replication was filed and testimony taken, and, there being no substantial dispute as to the facts, Mr. Arthur Hale, complainant's general superintendent of transportation, and also chairman of the car efficiency committee of the Americar Railway Association, was able to testify as to all matters

that counsel deemed necessary to bring to the court's attention, and was the only witness.

December 14, 1908, the cause came on for final hearing, and was argued before the two Circuit Judges and the District Judge designated by them. No final decree or judgment was entered, but the presiding judge entered the following order:

"This cause came on this day to be further heard, and was argued by counsel, and the court having fully considered the bill, answer, deposition and other papers filed herein, the judges sitting finding themselves divided in opinion as to the decree that should be entered herein,

"It is now ordered, that in accordance with the act of Congress applicable hereto, that this case be certified for review to the Supreme Court of the United States.

"December 14, 1908."

The cause was docketed in this court and the transcript of record filed January 25, 1909, as "On a certificate from the Circuit Court of the United States for the District of Maryland."

The act of Congress of February 11, 1903, c. 544, 32 Stat. 823, contains two sections, as follows:

"(1) That in any suit in equity pending or hereafter brought in any Circuit Court of the United States under the act entitled 'An act to protect trade and commerce against unlawful restraints and monopolies,' approved July second, eighteen hundred and ninety, 'An act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, or any other acts having a like purpose that hereafter may be enacted wherein the United States is complainant, the Attorney-General may file with the clerk of such court a certificate that, in his opinion, the case is of general public importance, a copy of which shall be immediately furnished by such clerk to each of the circuit judges of the circuit in which the case is pending. Thereupon such case shall be given precedence over others and in every way expedited,

and be assigned for hearing at the earliest practicable day, before not less than three of the circuit judges of said circuit, if there be three or more; and if there be not more than two circuit judges, then before them and such district judge as they may select. In the event the judges sitting in such case shall be divided in opinion, the case shall be certified to the Supreme Court for review in like manner as if taken there by appeal as hereinafter provided.

"SEC. 2. That in every suit in equity pending or hereafter brought in any Circuit Court of the United States under any of said acts, wherein the United States is complainant, including cases submitted but not yet decided, an appeal from the final decree of the Circuit Court will lie only to the Supreme Court and must be taken within sixty days from the entry thereof: *Provided*, That in any case where an appeal may have been taken from the final decree of the Circuit Court to the Circuit Court of Appeals before this act takes effect, the case shall proceed to a final decree therein, and an appeal may be taken from such decree to the Supreme Court in the manner now provided by law."

Section 16 of the Hepburn Act, so called, of June 29, 1906, c. 3591, 34 Stat. 584, 592, provides:

"The venue of suits brought in any of the Circuit Courts of the United States against the commission to enjoin, set aside, annul, or suspend any order or requirement of the commission shall be in the district where the carrier against whom such order or requirement may have been made has its principal operating office, and may be brought at any time after such order is promulgated.

* * * * * * * *

"The provisions of 'An act to expedite the hearing and determination of suits in equity, and so forth,' approved February eleventh, nineteen hundred and three, shall be, and are hereby, made applicable to all such suits, including the hearing on an application for a preliminary injunction, and are also made applicable to any proceeding in equity to

enforce any order or requirement of the commission, or any of the provisions of the act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, and all acts amendatory thereof or supplemental thereto. It shall be the duty of the Attorney-General in every such case to file the certificate provided for in said expediting act of February eleventh, nineteen hundred and three, as necessary to the application of the provisions thereof, and upon appeal as therein authorized to the Supreme Court of the United States, the case shall have in such court priority in hearing and determination over all other causes except criminal causes. . . . An appeal may be taken from any interlocutory order or decree granting or continuing an injunction in any suit, but shall lie only to the Supreme Court of the United States: *Provided further*, That the appeal must be taken within thirty days from the entry of such order or decree and it shall take precedence in the appellate court over all other causes, except causes of like character and criminal causes."

Mr. W. Irvine Cross and *Mr. Hugh L. Bond, Jr.*, with whom *Mr. W. Ainsworth Parker* was on the brief, for the Baltimore and Ohio Railroad Company.

Mr. Wade H. Ellis, Assistant to the Attorney-General, with whom *Mr. Luther M. Walter* and *Mr. Orla E. Harrison*, Special Assistants to the Attorney-General, were on the brief, for the Interstate Commerce Commission.

MR. CHIEF JUSTICE FULLER, after making the foregoing statement, delivered the opinion of the court.

By the Judiciary Act of March 3, 1891, a review by certificate is limited to the certificate or its equivalent by the Circuit Courts, made after final judgment, of the question, when raised, of their jurisdiction as courts of the United States,

and to the certificate by the Circuit Courts of Appeal of questions of law in relation to which the advice of this court is sought as therein provided, which certificates are governed by the same rules as were formerly applied to certificates of division. *United States* v. *Rider*, 163 U. S. 132; *The Paquete Habana*, 175 U. S. 677, 684; *Chicago, Burlington & Quincy Railway Company* v. *Williams*, 205 U. S. 444. And it has been established by repeated decisions that questions certified to this court upon a division of opinion must be distinct points of law clearly stated so that they can be distinctly answered without regard to other issues of law or of fact; and not questions of fact or of mixed law and fact involving inferences of fact from particular facts stated in the certificates; nor yet the whole case even if divided into several points. *Jewell* v. *Knight*, 123 U. S. 426, 433.

And finally it has been settled that the whole case, even when its decision turns upon matter of law only, cannot be sent here by certificate of division.

In *White* v. *Turk*, 12 Pet. 238, it was said: "The certificate of the judges, in this case, leaves no doubt that the whole cause was submitted to the Circuit Court, by the motion to set aside the judgment on the bond. And, had the court agreed in opinion, and rendered a judgment upon the points submitted; it would have been conclusive of the whole matter in controversy between the parties. This certificate, therefore, brings the whole cause before this Court; and, if we were to decide the questions presented, it would, in effect, be the exercise of original, rather than appellate jurisdiction." This practice was declared irregular by Chief Justice Taney in *Webster* v. *Cooper*, 10 How. 54, and the Chief Justice added that it "would, if sanctioned, convert this court into one of original jurisdiction in questions of law, instead of being, as the Constitution intended it to be, an appellate court to revise the decisions of inferior tribunals." So Mr. Justice Miller, in *United States* v. *Perrin*, 131 U. S. 55, 58, said:

"But it never was designed that, because a case is a trouble-

some one, or is a new one, and because the judges trying the case may not be perfectly satisfied as regards all the points raised in the course of the trial, the whole matter shall be referred to this court for its decision in advance of the regular trial, or that, in any event the whole case shall be thus brought before this court.

"Such a system converts the Supreme Court into a *nisi prius* trial court; whereas, even in cases which come here for review in the ordinary course of judicial proceeding, we are always and only an appellate court, except in the limited class of cases where the court has original jurisdiction."

Without discussing the evolution of the use of certificates reference to the legislation given below may be profitable.[1]

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[1] Section 6 of the "Act to amend the judicial system of the United States," April 29, 1802, c. 31, 2 Stat. 156, 159, provided:

"That whenever any question shall occur before a Circuit Court, upon which the opinions of the judges shall be opposed, the point upon which the disagreement shall happen, shall, during the same term, upon the request of either party, or their counsel, be stated under the direction of the judges, and certified under the seal of the court, to the Supreme Court, at their next session to be held thereafter; and shall, by the said court, be finally decided. And the decision of the Supreme Court, and their order in the premises, shall be remitted to the Circuit Court, and be there entered of record, and shall have effect according to the nature of the said judgment and order: *Provided*, That nothing herein contained shall prevent the cause from proceeding, if, in the opinion of the court, further proceedings can be had without prejudice to the merits. . . ."

This act was superseded by that of June 1, 1872, c. 255, 17 Stat. 196, which provided:

"That whenever, in any suit or proceeding in a Circuit Court of the United States, being held by a justice of the Supreme Court and the circuit judge or a district judge, or by the circuit judge and a district judge, there shall occur any difference of opinion between the judges as to any matter or thing to be decided, ruled, or ordered by the court, the opinion of the presiding justice or the presiding judge shall prevail, and be considered the opinion of the court for the time being; but when a final judgment, decree, or order in such suit or proceeding shall be entered, if said judges shall certify, as it shall be

In the present case no final judgment or decree or order determinative of the merits was rendered, but the court ordered "that this case be certified for review to the Supreme Court of the United States," and that "a transcript of the record and proceedings of the cause aforesaid, together with all things thereunto relating, be transmitted to the said Supreme Court of the United States; and the same is transmitted accordingly."

The act of Congress of February 11, 1903, provided in its first section that on the certificate of the Attorney-General the case should be assigned for hearing before not less than

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their duty to do if such be the fact, that they differed in opinion as to any question which, under the act of Congress of April twenty-ninth, eighteen hundred and two, might have been reviewed by the Supreme Court on certificate of difference of opinion, then either party may remove said final judgment, decree, or order to the Supreme Court, on writ of error or appeal, according to the nature of the case, and subject to the provisions of law applicable to other writs of error or appeals in regard to bail and supersedeas."

That was carried forward in 1874, by §§ 650, 652, 654, 693 and 697 of the Revised Statutes. Section 6 of the Judiciary Act of March 3, 1891, c. 517, 26 Stat. 826, 828, provided:

"SEC. 6. . . . Excepting that in every such subject within its appellate jurisdiction the Circuit Court of Appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision.

"And thereupon the Supreme Court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the Circuit Courts of Appeals in such case, or it may require that the whole record and cause may be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal.

"And excepting also that in any such case as is hereinbefore made final in the Circuit Court of Appeals it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it it had been carried by appeal or writ of error to the Supreme Court."

three judges, and that "in the event the judges sitting in such case shall be divided in opinion, the case shall be certified to the Supreme Court for review in like manner as if taken there by appeal as hereinafter provided." The order of the Circuit Court pursues the language of this provision and attempts to send up the whole case to be determined by this court. This invokes the exercise of original jurisdiction, and cannot be sustained.

In a note to *United States* v. *Ferreira*, 13 How. 40, 52, which was inserted by order of the court, the Chief Justice states the substance of the case of the *United States* v. *Yale Todd*, which was decided in February, 1794, but not printed, as there was at that time no official reporter. This note thus concludes:

"In the early days of the Government, the right of Congress to give original jurisdiction to the Supreme Court, in cases not enumerated in the Constitution, was maintained by many jurists, and seems to have been entertained by the learned judges who decided *Todd's case*. But discussion and more mature examination has settled the question otherwise; and it has long been the established doctrine, and we believe now assented to by all who have examined the subject, that the original jurisdiction of this court is confined to the cases specified in the Constitution, and that Congress cannot enlarge it. In all other cases its power must be appellate."

Such is the settled rule, and it is inadmissible to suppose that it was the intention of Congress to run counter to it.

Ordinarily in the Federal courts, in the absence of express statutory authority, no appeal can be taken or writ of error brought except from a final decree or to a final judgment. *McLish* v. *Roff*, 141 U. S. 661, 665; *Forgay* v. *Conrad*, 6 How. 201, 205. There is no final judgment or decree in this case, nor any judicial determination from which an appeal would lie. *The Alicia*, 7 Wall. 571, is in point. In that case it appeared that on the ninth day of January, 1863, a decree of

condemnation had been entered in the District Court against the Alicia and her cargo for violation of the blockade. From this decree an appeal was allowed and taken to the Circuit Court; and on the eighteenth of May, 1867, an order was made in that court on the application of the parties in interest—there being at this time, in the Circuit Court, no order, judgment or decree in the case—for the transfer of the cause to this court under the thirteenth section of the act of June 30, 1864, which enacted that prize causes, depending in the Circuit Court, might be so transferred. This court held that the cause was removed to the Circuit Court by the appeal from the decree of the District Court and that that decree was vacated by the appeal, and that the Circuit Court acquired full jurisdiction of the cause and was fully authorized to proceed to final hearing and decree. And Chief Justice Chase said (p. 573): "Nor can it be doubted that, under the Constitution, this court can exercise, in prize causes, appellate jurisdiction only. An appellate jurisdiction necessarily implies some judicial determination, some judgment, decree, or order of an inferior tribunal, from which an appeal has been taken. But in this case there had been no such order, judgment, or decree in the Circuit Court; and there was no subsisting decree in the District Court, from which an appeal could be taken. We are obliged to conclude that, in the provision for transfer, an attempt was inadvertently made to give to this court a jurisdiction withheld by the Constitution, and, consequently, that the order of transfer was without effect. The cause is still depending in the Circuit Court."

The result is that the order must be set aside and the case remanded to the Circuit Court with directions to proceed in conformity with law.

Ordered accordingly.

END OF CASE